# **Request for Reconsideration after Final Action**

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SIGNATORY'S NAME	Rachelle Dubow	
SIGNATORY'S POSITION	Attorney of record, Massachusetts bar member	
SIGNATORY'S PHONE NUMBER	6179518938	
DATE SIGNED	05/26/2015	
AUTHORIZED SIGNATORY	YES	
CONCURRENT APPEAL NOTICE FILED	YES	
FILING INFOR	MATION SECTION	
SUBMIT DATE	Tue May 26 16:47:39 EDT 2015	
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# **Request for Reconsideration after Final Action**

### **To the Commissioner for Trademarks:**

Application serial no. **86281869** has been amended as follows:

#### **EVIDENCE**

Evidence in the nature of Request for Reconsideration, Affidavit of Dan Hermann, co-founder and CEO of Paint Nite LLC, Affidavit of Lawrence T. Stanley, Jr., Attorney, survey conducted by Keegan & Donato Consulting, LLC, third party affidavits. has been attached.

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Evidence-1

Evidence-2

#### **Original PDF file:**

evi\_2051962044-20150526164201600016\_.\_The\_Banquet\_Affidavit.pdf

**Converted PDF file(s)** (2 pages)

Evidence-1

Evidence-2

#### SIGNATURE(S)

#### **Request for Reconsideration Signature**

Signature: /rachelledubow/ Date: 05/26/2015

Signatory's Name: Rachelle Dubow

Signatory's Position: Attorney of record, Massachusetts bar member

Signatory's Phone Number: 6179518938

The signatory has confirmed that he/she is an attorney who is a member in good standing of the bar of the highest court of a U.S. state, which includes the District of Columbia, Puerto Rico, and other federal territories and possessions; and he/she is currently the applicant's attorney or an associate thereof; and to the best of his/her knowledge, if prior to his/her appointment another U.S. attorney or a Canadian attorney/agent not currently associated with his/her company/firm previously represented the applicant in this matter: (1) the applicant has filed or is concurrently filing a signed revocation of or substitute power of attorney with the USPTO; (2) the USPTO has granted the request of the prior representative to withdraw; (3) the applicant has filed a power of attorney appointing him/her in this matter; or (4) the applicant's appointed U.S. attorney or Canadian attorney/agent has filed a power of attorney appointing him/her as an associate attorney in this matter.

The applicant is filing a Notice of Appeal in conjunction with this Request for Reconsideration.

Serial Number: 86281869

Internet Transmission Date: Tue May 26 16:47:39 EDT 2015 TEAS Stamp: USPTO/RFR-205.196.204.4-2015052616473915

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# IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicant: Paint Nite LLC	)
Mark: PAINT NITE	<ul><li>) Examining Attorney</li><li>) Morgan L. Meyers</li></ul>
Serial No.: 86281869	) Law Office 117
Int. Class: 25, 41	)
Filing Date: May 15, 2014	)
	_)

#### **REQUEST FOR RECONSIDERATION**

Joshua M. Dalton Rachelle A. Dubow Lawrence T. Stanley, Jr. MORGAN, LEWIS & BOCKIUS LLP One Federal Street Boston, MA 02110 (617) 951-8000

Attorneys for the Applicant, Paint Nite LLC

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Applicant Paint Nite LLC ("Applicant"), by and through its attorneys, respectfully submits this Request for Reconsideration (the "Response") in connection with Application Serial No. 86281869 (the "Application"). The Applicant is filing concurrently herewith a Notice of Appeal with the Trademark Trial and Appeal Board. Applicant is responding to the Office Communication dated November 24, 2014, where the Examining Attorney refused registration of this application under Section 2(e)(1) of the Trademark Act. The Examining Attorney is respectfully requested to reconsider her refusal in view of the following.

# I. RESPONSE TO REFUSAL BASED ON TRADEMARK ACT SECTION 2(E)(1)

#### A. Background

The Examining Attorney has twice refused registration of Applicant's mark, PAINT NITE, under Section 2(e)(1) of the Trademark Act, 15 U.S.C. Section 1052(e)(1), on the asserted grounds that the Mark is merely descriptive of the services identified in the Application. The services identified in the Application in International Class 41 are "entertainment services, namely arranging, organizing, conducting and hosting social entertainment events; information and advisory services regarding all of the aforesaid services, including information and advice provided electronically, including on a website" (Applicant's Services"). Despite the Examining Attorney's contention to the contrary, Applicant respectfully submits that Applicant's Mark is "suggestive" and not merely descriptive of the Applicant's Services and is therefore registrable on the Principal Register.

## B. Examining Attorney's Burden of Proof

The Examining Attorney must make a *prima facie* showing that a mark is merely descriptive. See In re Bel Paese Sales Co., 1 U.S.P.Q.2d 1233, 1234 (T.T.A.B. 1986); see also In re Etablissements Darty et Fils, 759 F.2d 15, 16 (Fed. Cir. 1985). If there is any doubt concerning the sufficiency of the Examining Attorney's evidence, the mark should be published for opposition. Bel Paese, 1 U.S.P.Q.2d at 1235; In re Gourmet Bakers, Inc., 173 U.S.P.Q. 765 (T.T.A.B. 1972). Passing a mark for publication allows the applicant's competitors -- those who

will be the most damaged by an erroneous registration -- to file an opposition and augment the evidence on the record. *Id.* 

# C. The Test for Merely Descriptive Marks

Section 2(e)(1) of the Lanham Act bars registration of a mark that is "merely descriptive." For a mark to be merely descriptive, it must tell a prospective customer only what the goods or services are, their function, their characteristics, or their use. See In re Application of Colonial Stores, Inc., 394 F.2d 549, 552 (C.C.P.A. 1968). If a mark conveys anything more to the consumer, then it is arbitrary, fanciful, or suggestive and not merely descriptive. See 1 Jerome Gilson, Trademark Protection and Practice § 2.03 (2001). Similarly, if the information conveyed by a mark is vague or indirect, then the mark is at least suggestive and not merely descriptive. See 1 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition §§ 11:67-11:68 (2001); See also Stix Products, Inc. v. United Merchants & Manufacturers, Inc., 295 F.Supp. 479, 487, 160 U.S.P.Q. 777, 784 (S.D.N.Y.1968) (The test for determining mere descriptiveness is whether the mark conveys an immediate idea of the ingredients, qualities, or characteristics of the goods "to the ultimate consumer, who has never seen the product and does not know what it is.").

Further, the test for mere descriptiveness must evaluate the mark when used with the goods or services identified in the application, not in the abstract. *In re Sundown Technology, Inc.*, 1 U.S.P.Q. 2d 1927, 1928 (T.T.A.B 1986). "This requires consideration of the context in which the mark is used or intended to be used in connection with those goods or services, and the possible significance that the mark would have to the average purchaser of the goods or services in the marketplace." T.M.E.P Section 1209.01(b); *See In re Omaha National Corp.*, 819 F.2d 1117, 2 U.S.P.Q.2d 1859 (Fed. Cir. 1987); *In re Abcor Development Corp.*, 588 F.2d 811, 200 U.S.P.Q. 215 (C.C.P.A. 1978); *In re Venture Lending Associates*, 226 U.S.P.Q. 285 (T.T.A.B. 1985).

A suggestive mark is eligible for registration on the Principal Register. "Suggestive

marks are those which require imagination, thought or perception to reach a conclusion as to the nature of the goods or services." T.M.E.P. § 1209.01(a).

If the qualities are not instantly apparent and the consumer must follow a multistep reasoning process in order to ascertain what product characteristics or qualities the term suggests, the term is suggestive and a valid trademark. Obviously, there must be a shade of descriptive meaning present or the suggestion process will not occur. Nevertheless, a minor degree of descriptiveness does not destroy the suggestive, or trademark, significance.

Gilson § 2.04, at 2-76 – 2-77.

#### D. PAINT NITE is Not Merely Descriptive Under the Appropriate Test

1. PAINT NITE does Not Convey an Immediate Idea of the Ingredients, Qualities, or Characteristics of the Services Listed in Applicant's Application

Applying the controlling standards, PAINT NITE is not merely descriptive of Applicant's Services as filed. PAINT NITE does not immediately and clearly describe the purpose and features of the listed services. Rather, PAINT NITE is a vague or indirect term open to interpretation, which takes multi-step reasoning to ascertain what the service might be or what it might do.

The Examining Attorney refers to printouts of definitions of the term "paint," such as "a substance used for decorating or protecting a surface" "to coat a surface with paint, as in decorating" "face make-up, such as rouge" "to apply make-up onto the face, lips, etc." "to describe vividly in words." The Examining Attorney also refers to definitions of "nite" such as "variant of night," "an informal, simplified spelling of night," and "the period of darkness between sunset and sunrise." Notably, the Examining Attorney does not cite any a definition for the phrase "paint nite." Applicant urges that this is because there is no ready understanding of what "paint nite" means.

Unable to refer to a definition of "paint nite," the Examining Attorney reasons that each of the terms are commonly used terms and that "[g]enerally, if the individual components of a mark retain their descriptive meaning in relation to the goods and/or services, the combination

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results" is descriptive. However, it is not clear what "paint nite" means in a literal sense. One does not naturally infer that "paint nite" describes social entertainment events in Class 41. Thus, it will be up to the consumer to consider what Applicant's services might be or what functions it might perform. As such, the mark functions as a suggestive mark.

This conclusion is supported by internet searches of the terms "paint nite," which show that there is no such thing as a generic/descriptive "paint nite" service, and instead specifically references Applicant's services involving dining, socializing, drinking and painting. Notably, Applicant has used the PAINT NITE mark in connection with social entertainment services in Class 41 which take place at times of the day other than at "night." Affidavit of Dan Hermann ("Hermann Aff.") at ¶ 6. For example, Applicant has promoted and offered services to corporate clients interested in providing team building social events at conferences, meetings and corporate retreats during the day. *Id.* These uses further support that PAINT NITE does not merely describe the services covered under the application, which on its face does not limit the services to social painting events at night.

The case of *Game Power Headquarters, Inc. v. Owens*, 37 U.S.P.Q.2d 1427, 1430-31 (E.D. Pa. 1995) is illustrative. There, the court found that the marks GAME POWER and GAME POWER HEADQUARTERS for selling video games were suggestive, reasoning that "[the] terms require imagination, thought or perception' to reach a conclusion as to the nature of the services." *Game Power Headquarters*, 37 U.S.P.Q. at 1431 (*quoting A.J. Canfield Company v. Honickman*, 808 F.2d 291, 297 (3rd Cir. 1986)). Likewise, in *Glamorene Products Corp. v. Boyle Midway Inc.*, 188 U.S.P.Q. 145, 164 (S.D.N.Y. 1975), the court held that the mark SPRAY & VAC for aerosol spray no scrub rug cleaners was suggestive, not descriptive. In so concluding, the court stated that "[a] mark is not merely descriptive unless descriptiveness is its *principal* significance. A mark is not descriptive if it merely suggests the nature or class of the product on which it is used." *Glamorene*, 188 U.S.P.Q. at 162, 164 (emphasis in original) ("The term SPRAY & VAC could not be the proper generic name for the products here in issue because all aerosol spray rug cleaners involve spraying and vacuuming. ... SPRAY & VAC is no

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more descriptive of the present product than of any other aerosol product which required spraying on and ultimately vacuuming up. But even applied to those products, it is suggestive and not merely descriptive."). Similarly, here, Applicant's Mark is only suggestive of aspects of Applicant's Services.

Moreover, a mark does not have to be devoid of all meaning relative to the goods and services to be registrable. See T.M.E.P. § 1209.01(a). Indeed, if a generally descriptive mark evokes at least one possible meaning that is imaginative in nature, even if not the first to come to mind, the mark as a whole will not be considered merely descriptive. As shown in Estee Lauder, Inc. v. The Gap, Inc., 932 F. Supp. 559 (S.D.N.Y. 1996), rev'd on other grounds, 108 F.3d 1503 (2d Cir. 1996), even where a mark has some descriptive meanings, if at least one meaning attributable to a mark is suggestive, the mark is "protectable without proof of secondary meaning." Id. at 608 (finding that mark "100% TIME RELEASE MOISTURIZER" was suggestive because, the third of three possible interpretations of the mark -- "(1) this bottle contains nothing but time release moisturizer, (2) this product moisturizes 100% of the time, and (3) this is 100% (the brand) time release moisturizer" -- was suggestive); see also In re Ocusoft, Inc., 2005 WL 1463854 (T.T.A.B. June 10, 2005) (finding "Night and Day" for eye gel suggestive because, while it may describe the fact that the product works during the night and during the day, it also evokes the famous Cole Porter song and the phrase "I've been working night and day"); In re TMS Corp. of the Americas, 200 U.S.P.Q. 57, 59 (T.T.A.B. 1978) (holding THE MONEY SERVICE registrable because it "falls short of describing Applicant's services in any one degree of particularity").1

<sup>&</sup>lt;sup>1</sup> Other examples of marks that have been found to be suggestive rather than merely descriptive include CLASSIC CAR WASH for car wash services, LASER PRINTER MANAGEMENT SYSTEM for the servicing of laser printers, and DIAL-A MATTRESS for a service of selling mattresses by telephone. See Wynn Oil Co. v. Thomas, 839 F.2d 1183, 1190 (6th Cir. 1988); Laser Services Inc. v. Deenin, 29 U.S.P.Q.2d 1064, 1066 (D. Or. 1993); Dial A Mattress Operating Corp. v. Mattress Madness, Inc., 33 U.S.P.Q.2d 1961, 1966 (E.D.N.Y. 1994).

Here, PAINT NITE could be interpreted in numerous ways. For example, it could be interpreted as at least an artistic painting of a nighttime scene, physically painting a nighttime scene, physically painting art at night, physically painting a house or building at night, physically painting cars or other objects at night, the purchase of paint at night (such as during an in-home party or presentation), or playing paintball at night. Indeed, "Paint Nite" as a company name could just as easily refer to, or more likely refer to, a company that paints things for its consumers at night (i.e., offices, houses, cars, etc.) than it does to a company that hosts social painting events at restaurants and bars. As such, descriptiveness is not the principal significance of Applicant's Mark. Rather, when viewed in its entirety, PAINT NITE conveys a novel and imaginative commercial impression. If there is doubt as to whether a mark is descriptive, such doubt should be resolved in favor of the Applicant. *In re Shutts*, 217 U.S.P.Q. (BNA) 363, 365 (T.T.A.B. 1983) ("we have doubts about the 'merely descriptive' character of the mark before us and, unlike the situation in determining likelihood of confusion under Section 2(d) of the Trademark Act, it is clear that such doubts are to be resolved in favor of Applicants.").

Applicant respectfully submits that the multiple possible meanings for the term PAINT NITE render Applicant's Mark suggestive when considered in connection with Applicant's Services. While the words "paint" and "nite" are sometimes used for various entertainment services, these terms are so broad that a reader gains no insight from the terms as to what Applicant's services may be, or what function they might perform. Simply put, Applicant's mark is a classically suggestive mark -- the mark 'sheds light upon the characteristics' of the services, but requires 'imagination, thought or perception' to reach a conclusion as to the nature of the services. As such, PAINT NITE should be registered on the Principal Register.

# 2. Third Party Registrations Confirm The Registrability of PAINT NITE

In its prior response to Office Action, Applicant identified the following registrations of marks that contain a combination of common words with the term "NIGHT" in Class 41, and that did not require a disclaimer of the term "NIGHT" (copies of printouts from the PTO

database are attached hereto as Ex. A to the Affidavit of Lawrence T. Stanley, Jr. ("Stanley Aff."):

- COMBAT NIGHT Reg. No. 4,428,730 (Entertainment services in the nature of live mixed martial arts (MMA) events; Presentation of mixed martial arts (MMA) events);
- MOTORCYCLE NIGHT Reg. No. 4,587,395 (Arranging, organizing, conducting and hosting social entertainment events for motorcycle enthusiasts);
- GAME NIGHT Reg. No. 4,263,996 (Providing a web site featuring sporting information; Providing news and information in the field of sports);
- FAMILY GAME NIGHT Reg. No. 4,260,207 ("Entertainment services, namely, an on-going television game show; entertainment services, namely, an on-going television game show segment");
- FIGHT NIGHT Reg. No. 4,579,918 (Educational services, namely, conducting classes, seminars, conferences, workshops and simulcasts in the field of marriage, and the distribution of course materials therewith; Entertainment services, namely, providing an ongoing radio program in the field of marriage; Entertainment services, namely, providing podcasts in the field of marriage; Entertainment, namely, a continuing talk show broadcast over radio, television and internet);
- EARTH NIGHT Reg. No. 4,504,271 (Arranging and conducting of concerts);
- SOUTHERN NIGHTS Reg. No. 4,365,546 (Entertainment services in the nature of continuing program series, featuring live action, comedy and drama provided through cable television, broadcast television, internet, video-ondemand, and through other distribution platforms; providing online information in the field of entertainment concerning television programs);
- HOLIWOOD NIGHTS Reg. No. 4,083,573 (Amusement park and theme park services; Amusement parks; Entertainment in the nature of an amusement park

ride; Entertainment services in the nature of an amusement park attraction, namely, a themed area; Entertainment services in the nature of an amusement park show; Entertainment services, namely, arranging and conducting special events at an amusement park; Entertainment services, namely, arranging for ticket reservations for amusement park attractions; Providing amusement parks; Providing theme park services; Provision of information relating to amusement park shows);

 OCEAN NIGHT - Reg. No. 4,601,326 (Entertainment media production services for motion pictures, television and Internet; Media production services, namely, video and film production; Production and distribution of television shows and movies; Production of monoscopic and/or stereoscopic, electronic, digital video and/or film).

The Examining Attorney gave no weight these registrations and argued that Applicant's own registration on the Supplemental Register for the same phrase PAINT NITE (Reg. No. 85860668) confirms the descriptiveness. The Examining Attorney, however, failed to consider the different services listed in Reg. No. 85860668 than listed in the subject Application. In Reg. No. 85860668, the goods and services are identified as "instruction in the field of art." Thus, the identified services in the application were specifically limited to the act of painting. Here, however, the goods and services are identified as "entertainment services, namely arranging, organizing, conducting and hosting social entertainment events; information and advisory services regarding all of the aforesaid services, including information and advice provided electronically, including on a website." The services are not limited to the act of painting, and certainly not the act of painting at night.

Accordingly, Applicant submits that its mark PAINT NITE is as suggestive as the registrations cited above for the respective services in Class 41, and is not merely descriptive of the services covered in the application. Applicant urges that the Examining Attorney's evidence regarding the descriptiveness of the words "paint nite" in connection with the identified services

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in Class 41 is not supported by the overwhelming evidence that exists within the federal register. As such, Applicant urges the Examining Attorney to reconsider her position, and approve the mark for publication.

#### II. APPLICANT'S MARK HAS ACQUIRED DISTINCTIVENESS

Applicant maintains that its PAINT NITE mark is inherently distinctive, and thus is entitled to registration on the Principal Register without a showing of acquired distinctiveness. Even assuming *arguendo* that the mark is descriptive, the PAINT NITE mark is still entitled to registration because Applicant's Mark has become distinctive of the services claimed in the Application and is therefore registrable on the Principal Register pursuant to Section 2(f), 15 U.S.C. § 1052(f).

The evidence submitted herewith that establishes that Applicant's Mark has acquired distinctiveness includes, *inter alia*, (1) a survey conducted by Mark Keegan and Anthony Donato of Keegan & Donato Consulting, LLC ("Keegan & Donato"), (2) the Affidavit of Dan Hermann describing Applicant's company history and its extensive advertising and sales, and (3) the Affidavits of Applicant's vendors, Brianna Brown (Hospitality Manager at Bertucci's Medford, MA), I.V. Miller (General Manager, Bar Louie, Hampton, VA), Savannah Yauss (Sales and Event Coordinator, Joe's Crab Shack), Vicki Owings (Event Coordinator, Morgan Street Brewery), and Barbara de Oliveira (Director of Sales at The Regatta Banquet and Conference Center), each of which describes their familiarity with Applicant's PAINT NITE brand.

The survey by Keegan & Donato is particularly instructive, as it confirms that (i) among consumers who associate the name "Paint Nite" with a company or companies, 57% of those respondents associate "Paint Nite" with one company, (ii) among all secondary meaning respondents, 35% associate the name Paint Nite with only one company (which represents the largest measurement across all answer categories), and (iii) Paint Nite was the most recognized social painting brand among respondents both unaided and aided, with 43% of respondents identifying Paint Nite unaided (*more than four times* the awareness among consumers than the

next most cited social painting brand (43 percent vs. 9 percent)) and with 50% of respondents indicating an awareness of Paint Nite aided (*more than double* the awareness among consumers than the next most recognized social painting brand (50 percent vs. 23 percent)).

In order to further prosecution, and without conceding the issue of whether PAINT NITE is inherently distinctive, Applicant submits, in the alternative, that based on the continuous and substantially exclusive use of PAINT NITE, and, the public's understanding of the significance of PAINT NITE as demonstrated by the evidence submitted herewith Applicant's Mark has acquired distinctiveness under Section 2(f) of the Trademark Act, 15 U.S.C. § 1052(f).

#### A. The Standard

A claim of acquired distinctiveness may be supported where a mark has been used in commerce in a manner sufficient to support registration on the Principal Register pursuant to Section 2(f) of the Trademark Act, 15 U.S.C. § 1052(f). See T.M.E.P. § 1212. In response to a refusal to register, an applicant may submit actual evidence of acquired distinctiveness. See 37 C.F.R. § 2.41(a). "The mark can be registered [on the Principal Register] upon an adequate evidentiary showing that the mark has acquired a secondary meaning 'sufficient to identify an applicant's goods." In re Owens-Corning Fiberglas Corp., 774 F.2d 1116, 227 U.S.P.Q. 417, 421 (Fed. Cir. 1985) (citing Hehr, 279 F.2d at 528, 126 U.S.P.Q. at 382). "In considering a claim of acquired distinctiveness, the issue is whether acquired distinctiveness of the mark in relation to the goods or services has in fact been established in the minds of the purchasing public." T.M.E.P. § 1202.06.

Factors to be considered in determining whether a term has acquired distinctiveness include the following: (i) the length and manner of use of the mark by the applicant; (ii) the nature and extent of advertising and promotion of the mark; and (iii) efforts made to promote a conscious connection, in the consumer's mind, between the mark and a particular product or service. Pebble Beach Co. v. Tour 18 I Ltd., 942 F. Supp. 1513, 1538 (S.D. Tex. 1996) (citing Boston Beer Co. v. Slesar Bros. Brewing Co., 9 F.3d 175, 181 (1st Cir. 1993)); see also 2

McCarthy on Trademarks and Unfair Competition § 15:62 (4th ed.) ("The question of distinctiveness under [Section 2(f)] is one of fact. A mark may become distinctive within a period of time much shorter than five years, or it may never achieve distinctiveness no matter how long it is used.") (citing *Ex parte Fox River Paper Corp.*, 99 U.S.P.Q. 173 (Comm'r Pat. 1953)). Moreover, the success of Applicant's promotional efforts may be inferred from substantial publicity. *Pebble Beach*, 942 F. Supp at 1539; *Washington Speakers Bureau Inc. v. Leading Auths. Inc.*, 49 U.S.P.Q.2d 1893, 1900 (E.D. Va. 1999).

### B. Applicant Has Acquired Secondary Meaning In The Mark

Applying the factors of Pebble Beach, the evidence submitted herewith supports a conclusion that Applicant has acquired secondary meaning in the mark PAINT NITE. In support of its claim of acquired distinctiveness, Applicant submits into evidence (1) the results of a consumer survey in the form of the "Study of Secondary Meaning and Consumer Perceptions of Paint Nite" by Keegan & Donato Consulting, LLC (hereafter, the "Keegan & Donato Expert Report"); (2) details regarding efforts by Applicant in promoting and maintaining a conscious and close connection between Applicant's Mark and Applicant's Services, including expenditures on advertising and dozens of samples of advertisements and other promotional efforts, in the form of the Affidavit of Dan Hermann and the exhibits thereto (Exhibits A-E); and (3) real-world examples of consumer perceptions via affidavits from Applicant's vendors, Brianna Brown (Hospitality Manager at Bertucci's Medford, MA), I.V. Miller (General Manager, Bar Louie, Hampton, VA), Savannah Yauss (Sales and Event Coordinator, Joe's Crab Shack), Vicki Owings (Event Coordinator, Morgan Street Brewery), and Barbara de Oliveira (Director of Sales at The Regatta Banquet and Conference Center) describing their respective awareness of the PAINT NITE brand and how closely they each associate "PAINT NITE" with Applicant.

#### 1. Survey Evidence Supports A Finding Of Secondary Meaning

The survey conducted by Keegan & Donato shows (1) that Applicant's Mark is perceived

as a brand and (2) that there is a very substantial association in the minds of consumers between Applicant's Mark and Applicant's Services, and thus constitutes strong evidence that PAINT NITE is protectable as a trademark, and Applicant has developed secondary meaning in Applicant's Mark. It is commonly accepted that consumer surveys provide the strongest evidence on issues of secondary meaning. See, e.g., Herman Miller, Inc. v. Palazzetti Imports & Exports, Inc., 270 F.3d 298, 312 (6th Cir. 2001) ("Because the determination of whether a mark has acquired secondary meaning is primarily an empirical inquiry, survey evidence is the most direct and persuasive evidence."") (quoting Sugar Busters LLC v. Brennan, 177 F.3d 258, 269 (5th Cir. 1999)); Schering Corp. v. Pfizer Inc., 189 F.3d 218, 225 (2d Cir. 1999) ("Surveys are . . . routinely admitted in trademark . . . cases to show actual confusion, genericness of a name or secondary meaning, all of which depend on establishing that certain associations have been drawn in the public mind."); Zatarains Inc. v. Oak Grove Smokehouse, Inc., 698 F.2d 786, 795 (5th Cir. 1983) ("Survey evidence is the most direct and persuasive way of establishing secondary meaning.").

Here, Applicant commissioned a survey to assess consumer attitudes towards the phrase "Paint Nite," including whether consumers in the social painting market believe the phrase is a brand name and whether consumers recognize Applicant as the source of entertainment services offered under the mark PAINT NITE. The survey was conducted by Keegan & Donato. Keegan & Donato is a consulting firm serving litigators and their clients, and its areas of expertise include intellectual property, consumer survey research, damages analysis, forensic economic analysis, marketing, and related disciplines. Keegan & Donato Expert Report at ¶ 12. Keegan & Donato designs and executes methodologically sound consumer survey research studies and objective evaluation of existing survey research. *Id.* Keegan & Donato has designed, executed, and critiqued hundreds of surveys that have been admitted into evidence in federal and state courts, at arbitration, and to the TTAB. *Id.* at ¶ 13. Keegan & Donato is a member of ESOMAR, the leading global association for market, social, and opinion research, as well as the International Trademark Association (INTA). *Id.* at ¶ 14.

The methodology and results of the survey are truly and accurately described in Keegan & Donato Expert Report. The first objective of the study was to determine the extent to which, if at all, Applicant has developed secondary meaning in the phrase "Paint Nite" among a representative sample of consumers in the social painting market. *Id.* at ¶ 18. An additional objective of the study was to measure consumer awareness of the PAINT NITE brand, namely how familiar consumers are with a brand relative to other competing brands in the marketplace. *Id.* at ¶ 19. The study design consisted of two separate modules: a secondary meaning module and a consumer awareness module. *Id.* at ¶ 21. Qualified respondents were randomly assigned to either the secondary meaning OR the consumer awareness module (not both). *Id.* This method was employed to prevent respondent conditioning and/or biased responses (e.g., through repeated exposure to the Paint Nite mark between the modules). *Id.* 

The secondary meaning module followed a standard design wherein respondents were asked whether, in the context of social painting, they associate the name Paint Nite with one company or more than one company. *Id.* at ¶ 22. An open-ended follow up question—"Why do you say that?"—gave respondents the opportunity to explain the reasoning behind their selected answer. *Id.* The consumer awareness module used a two-pronged approach to gauge respondents' awareness of the Paint Nite brand. *Id.* at ¶ 23. First, respondents were presented with an unaided recall question wherein they were asked to think of and record all of the social painting brands they can recall. *Id.* Following this exercise, respondents were then presented with a list of social painting brands (including PAINT NITE) and were asked to select all brands with which they are familiar. *Id.* 

A total of 404 people were questioned online (202 in the secondary meaning module and 202 in the consumer awareness module). *Id.* at ¶ 29. A sample size of over 200 respondents was chosen to ensure an approximately 95% confidence level in the survey. *Id.* To generate reliable results it is necessary to sample from the population that most closely resembles the target market—i.e., those consumers who would likely have exposure to the product or service of interest in the marketplace. *Id.* at ¶ 30. As such, the population most likely to have exposure to

and familiarity with the PAINT NITE brand are those who have participated in or anticipate participating in a social painting event. *Id.* Therefore, for the purpose of this survey, a qualified respondent was defined as someone who: (i) Has participated in a social painting event in the past six months or anticipates doing so in the next six months and (ii) Resides in a major metropolitan market where social painting events take place. *Id.* at ¶31. Additionally, because social painting events primarily attract female customers who are of legal drinking age and typically take place at bars and restaurants that serve alcohol, all respondents were required to be females who are at least 21 years of age. *Id.* at ¶32. Any potential respondents who did not meet the requirements defined above were excluded from participation in the survey. *Id.* at ¶33.

As discussed in detail in the Keegan & Donato Expert Report, the survey demonstrates that the primary significance of the mark PAINT NITE in the minds of those consumers who associate "Paint Nite" with a company or companies is as a brand. Of all respondents in the secondary meaning module, 35% of those respondents associate the name Paint Nite with one company, representing the largest measurement across all answer categories. *Id.* at ¶ 37. Furthermore, 57% of consumers who associate "Paint Nite" with one company or more than one company associate Paint Nite with a single company. *Id.* at ¶ 66. Indeed, a high level of secondary meaning was observed across all secondary meaning module respondents, as respondents attributing Paint Nite to a single source was the most frequently chosen response among consumers in the social painting market. *Id.* at ¶ 67. The open-ended responses to the question asking consumers why they associate Paint Nite with a single company are particularly enlightening, with such responses including:

- "I know there is a company called Paint Nite. I know there are other companies that put on 'Paint and Wine' nights, but Paint Nite is a specific company"
- "In CT there is an actual company called Paint Nite...there are other painting companies but Paint Nite has brand recognition with me."

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- "I've seen the company Paint Nite advertised. I have seen their Facebook page"
- "I have only done these events with Paint Nite"

Id. at ¶ 68. These and other verbatim responses cited in the Keegan & Donato Expert Report show that Applicant has built strong single source attribution among relevant consumers in the social painting market. Id. at ¶ 69. These responses show a high and detailed level of recall about the brand among consumers as a distinctive, single source of social painting services. Id. The strong single source attribution of Paint Nite exhibited by consumers is reflective of Applicant's seniority in this relatively young market. Id. Thus, as shown in the results of the secondary meaning module, Applicant has built significant secondary meaning among relevant consumers in the social painting market. Id. at ¶ 70.

Similarly, the results of the consumer awareness module also confirm Applicant's strong brand recognition in the PAINT NITE mark. The results of the consumer awareness module reflect that when consumers were asked to recall from their own memory all of the social painting brands with which they were familiar, Applicant was by far the most cited brand. *Id* at ¶ 71. Specifically, as reflected in Table 4 from the Keegan & Donato Expert report (reproduced below), 43 percent of those respondents who could recall at least one social painting brand cited Applicant. *Id.* at ¶ 71-72.

(Base: Consumer awareness module respondents who recalled at least one social painting brand)	(122) %
Paint Nite	43
Muse Paint Bar	9
Painting With A Twist	4
Upaint	4
Paint Bar	3
Paint Mixer	2
Social Artworking	2
Pinot's Palette	2

At this level of recall, unaided consumer awareness of Applicant is over *four times* that of the next most cited social painting brand—i.e., Muse Paint Bar at 9 percent. *Id.* at ¶ 72. The

fact that nearly half of respondents who could recall at least one social painting brand from memory cited Applicant provides empirical evidence that Applicant has captured significant mindshare among consumers in the social painting market. *Id.* at ¶ 73. Further, the fact that other competitors in the social painting market were cited so infrequently by respondents (as compared to Applicant) cements Applicant's position as the dominant participant in the market. *Id.* 

Respondents in the consumer awareness module were next asked a closed-ended, aided recall question to determine their awareness of social painting brands. *Id.* at ¶ 74. The results show that when asked to select from a list of social painting brands those brands with which they are familiar, Applicant again emerged as the most well-known brand among consumers. *Id.* Specifically, consumer awareness of Applicant is widespread, with one in two consumers (50 percent) in the social painting market indicating awareness of the Paint Nite brand. Compared to other brands in the social painting market, consumer awareness of Applicant is more than double that of the next most recognized brand (50 percent vs. 23 percent). *Id.* at ¶ 75. This data again confirms that Applicant is the dominant market leader with broad consumer awareness in the social painting market. *Id.* 

Consistent with the case law and leading treatises,<sup>2</sup> the results of the survey conducted by Keegan & Donato lead to the unambiguous conclusion that Applicant has developed strong

<sup>&</sup>lt;sup>2</sup> See McCarthy, § 32:190 ("Generally, figures over 50% are regarded as clearly sufficient [evidence of secondary meaning]. However, figures of 46 percent and 37 percent have also been found sufficient."); see also President & Trustees of Colby College v. Colby College--New Hampshire, 508 F.2d 804 (1st Cir. 1975) (50 percent); RJR Foods, Inc. v. White Rock Corp., 201 U.S.P.Q. 578, 1978 WL 21389 (S.D.N.Y. 1978), aff'd, 603 F.2d 1058, 203 U.S.P.Q. 401 (2d Cir. 1979) (66% association probative of secondary meaning in trade dress design); Harlequin Enterprises, Ltd. v. Gulf & Western Corp., 644 F.2d 946 (2d Cir. 1981) (50% association probative of secondary meaning in book cover design); Cartier, Inc. v. Four Star Jewelry Creations, Inc., 348 F. Supp. 2d 217, 230 (S.D. N.Y. 2004) (consumer recognition of a CARTIER watch design as identifying a single source was in the range of 50% to 60% and sufficed to prove secondary meaning); Tri-Star Pictures, Inc. v. Unger, 14 F. Supp. 2d 339, 349 (S.D.N.Y. 1998) (secondary meaning in the movie title BRIDGE ON THE RIVER KWAI was proven by a survey showing that of the 42% who had heard of or seen a movie with "River Kwai" in the title, 74% of them correctly identified BRIDGE ON THE RIVER KWAI as that movie).

secondary meaning in the mark PAINT NITE, as there is a well-established and substantial correlation between the mark PAINT NITE and Applicant as the source for services offered under that mark. *Id.* at ¶¶ 77-78.

The results summarized in the Keegan & Donato Expert Report alone should be sufficient to establish acquired distinctiveness under Section 2(f). Nonetheless, additional evidence probative of acquired distinctiveness is described below.

# 2. Applicant's Efforts To Promote A Conscious Connection With The PAINT NITE Mark

As set forth in the attached Affidavit of Dan Hermann, Applicant's co-founder and CEO, Applicant was founded in 2012 as a new concept of blending two timeless pastimes (artistic painting and drinking cocktails) as a way to draw patrons into local restaurants and pubs on slower days with a unique opportunity to socialize and be creative. Hermann Aff. at ¶ 4. PAINT NITE parties are held daily. *Id.* at ¶ 5. The typical PAINT NITE party has approximately 25 people in attendance, lasts approximately two hours, and is led by a master local artist, who instructs the patrons and takes them from blank canvas to masterpiece. *Id.* 

After coining the term "PAINT NITE" in 2012, Applicant created a campaign using this term to actively brand its entertainment services. *Id.* at ¶ 7. Since launching its business, Applicant has continuously and substantially exclusively used the mark PAINT NITE in connection with its services. *Id.* at ¶ 8. Applicant has offered its PAINT NITE-branded services in over 1,000 worldwide cities and is actively offering its services in approximately 975 cities across 160 metropolitan areas in six countries. *Id.* Applicant hosts more than 4,800 events per month, with more than 150,000 people attending those events each month. *Id.* Applicant has over 735 artists that lead the various Paint Nite events around the world. *Id.* Applicant has hosted events at several well-known restaurant chains across the United States, including Applebee's, TGI Friday's, Macaroni Grill, Bertucci's, Fox & Hound, and UNO. *Id.* 

Applicant's use of the PAINT NITE mark is reflected in a variety of marketing and promotional efforts, including online advertisements, such as AOL, Popsugar, PureWow,

SparkPeople and Scripps. *Id.* at ¶ 9; *see also* Exhibit A (representative branded social media), Exhibit B (representative marketing emails), Exhibit C (representative Facebook Ads), and Exhibit D (representative online banner advertisements) to Hermann Aff. In addition to promoting its PAINT NITE brand through advertisements, Applicant's website has also long promoted the PAINT NITE brand. Hermann Aff. at ¶ 10. Applicant has maintained a website since at least 2012, sample pages of which are attached to the Hermann Aff. *See id.*; *see also* Exhibit E to the Hermann Aff. Applicant also has a strong social media presence, including a "main" Facebook page (with over 100,000 likes) and a "main" Twitter page (with over 3,000 followers), not to mention Applicant's local Facebook and Twitter pages in its various markets, which collectively have more than 371,004 likes on the Facebook pages and 27,304 followers on the Twitter pages. Hermann Aff. at ¶ 10.

All told, since 2012, Applicant has spent more than \$1.2 million dollars marketing its PAINT NITE-branded entertainment services, generating over \$31 million in revenue. *Id.* at ¶11. . Applicant's vast marketing activities have garnered significant press, including television, print, and online. *Id.* at ¶12. For example, Applicant's PAINT NITE services have been featured on MSN.com (over 54,000,000 unique monthly visitors), womenshealth.com (over 5,000,000 unique monthly visitors), BostonMagazine.com (over 300,000 unique monthly visitors), Women's Health magazine (circulation of over 1,500,000), The Boston Globe newspaper and website (over 4,000,000 unique monthly visitors online and print circulation over 200,000), BaltimoreSun.com (over 1,600,000 unique monthly visitors), Chicago Tribune newspaper and website (over 20,000,000 unique monthly visitors online and print circulation over 400,000), Miami Herald newspaper and website (over 15,000,000 unique monthly visitors online and print circulation of over 140,000), and various network affiliates across the country, including in Boston (MA), Roanoke (VA), Louisville (KY), Birmingham (AL), Salt Lake City (UT), and Honolulu (HI). *Id*.

Through Applicant's extensive advertising, sales, and continuous and substantially exclusive use since at least 2012, Applicant has developed a distinctive and well-known brand of

entertainment services under the mark PAINT NITE. As a result, to the extent the term could be deemed descriptive of entertainment services, which conclusion Applicant refutes, the term has acquired distinctiveness and developed a special significance for Applicant's entertainment services.<sup>3</sup>

#### 3. Customers in the Industry Associate PAINT NITE With Applicant

The extent to which Applicant has acquired distinctiveness is further evidenced by the testimony set forth in the attached affidavits of Brianna Brown (Hospitality Manager at Bertucci's Medford, MA), I.V. Miller (General Manager, Bar Louie, Hampton, VA), Savannah Yauss (Sales and Event Coordinator, Joe's Crab Shack), Vicki Owings (Event Coordinator, Morgan Street Brewery), and Barbara de Oliveira (Director of Sales at The Regatta Banquet and Conference Center), each of whom are vendors for Applicant's services. Importantly, sworn testimony from the relevant consuming public is directly relevant to the question of acquired distinctiveness. See, e.g., Pic Design Corp. v. Bearings Specialty Co., 436 F.2d 804, 807 (1st Cir. 1971) ("[P]laintiff has clearly satisfied any burden of proving 'secondary meaning' by submitting affidavits from the purchasing agents of five of its customers stating that, when they order a Pic product, they expect to receive a product supplied by Pic."); In re Petersen Mfg. Co., 229 U.S.P.Q. 466, 469 (T.T.A.B. 1986) (finding customer declarations to be of "sufficient probative value to justify allowance of applicant's applications" because the "declarant that the source of these tools is applicant alone and that the designation, therefore, acts as a trademark").

Here, each of the declarants has testified that (1) they have served as vendors for Applicant's services on multiple occasions, (2) the first time any of them saw entertainment

<sup>&</sup>lt;sup>3</sup> Applicant has had a significant impact on the lives of its employees, master artists, and customers. In celebrating its third anniversary, certain employees, artists and customers participated in a video describing the impact Paint Nite has had. That video, which supports the strong brand recognition Applicant has generated, may be viewed at https://vimeo.com/127546132. The password is: PaintNite2015. Herman Aff. at ¶ 13.

services referred to as "Paint Nite" was when Applicant created its PAINT NITE brand of entertainment services, (3) they have each personally witnessed Applicant consistently utilize the PAINT NITE brand in its advertisements, signage, and elsewhere over the last several years to refer to Applicant's own entertainment services, and (4) as a result of these years of effort by Applicant, and the exclusive use of the phrase "Paint Nite" in reference to Applicant's services, they each personally associate "Paint Nite" solely with Applicant. See Affidavit of Brianna Brown (Hospitality Manager at Bertucci's, Medford, MA), Affidavit of I.V. Miller (General Manager, Bar Louie, Hampton, VA), Affidavit of Savannah Yauss (Sales and Event Coordinator, Joe's Crab Shack), Affidavit of Vicki Owings (Event Coordinator, Morgan Street Brewery), and Affidavit of Barbara de Oliveira (Director of Sales at The Regatta Banquet and Conference Center). The testimony from the five declarants are consistent with and reinforce the findings summarized in the Keegan & Donato Expert Report.

Furthermore, while there have been recent efforts by parties not associated with Applicant to use the PAINT NITE mark without Applicant's authorization, for the majority of the time since Applicant launched its PAINT NITE brand in 2012, it has enjoyed substantially exclusive use of that mark. Hermann Aff. at ¶ 14. In response to unauthorized third party uses of PAINT NITE (or PAINT NIGHT), Applicant has increased its efforts to protect and police its rights in its proprietary brand. More specifically, in the past two years, Applicant has sent approximately twenty cease and desist letters to companies using the marks PAINT NITE or PAINT NIGHT in connection with their social painting events. *Id.* Those unauthorized third party uses include uses by Wicked Art Bar, Muse Paintbar, Paint & Create, Arlington Art Lounge, Drinkable Arts, and Jersey Shore Paint Party. *Id.* Hermann Aff. Notably, no company that has received a cease and desist letter from Applicant has refused to cease use of the PAINT NITE mark, or challenged Applicant's rights in or to its proprietary PAINT NITE mark. *Id.* 

In sum, because actual consumers of Applicant's services recognize and understand that Applicant's PAINT NITE mark is a valid mark to identify the source of services provided by Applicant, this evidence weighs in favor of finding acquired distinctiveness. In view of

Applicant's extensive advertising, sales, enforcement efforts, and continuous and substantially exclusive use of the PAINT NITE mark since at least 2012, and in view of the evidence submitted herewith from third parties reflecting how strongly the relevant consuming public associates Applicant with the PAINT NITE mark, the primary significance of the PAINT NITE mark in the mind of the consuming public is not merely a service, but rather a producer/source of entertainment services.

In sum, Applicant requests that the Examining Attorney allow registration of the mark PAINT NITE on the Principal Register, as the Mark has acquired distinctiveness through Applicant's substantial and continuous use and promotion of the Mark in connection with Applicant's Services. The Keegan & Donato Expert Report, consumer testimony, the length and manner of use of the Mark in commerce, industry use, and the considerable, lengthy, and sustained promotion by Applicant of the Applicant's Mark in print, online and elsewhere all support a finding that Applicant's PAINT NITE Mark has acquired secondary meaning as an indicator of source for Applicant's Services. Accordingly, Applicant's Mark should be deemed registrable on the Principal Register in accordance with T.M.E.P. § 1212.02(a).

#### III. REQUEST TO DIVIDE APPLICATION

Applicant requests that the Application be divided, maintaining Class 41 in the parent application, and placing Class 25 in the child application so that Applicant may proceed with registration of Applicant's Mark in Class 25, which has not been refused. Applicant submits concurrently herewith a Request to Divide the Application.

#### IV. <u>CONCLUSION</u>

By the above request for reconsideration, Applicant believes that it has satisfactorily addressed the issues raised by the Examining Attorney in the Office Action. Under all of the tests of suggestiveness versus descriptiveness, PAINT NITE proves to be at least suggestive (and, accordingly, inherently distinctive), and therefore suitable for registration on the Principal Register. In the alternative, PAINT NITE has acquired distinctiveness and, therefore, is

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registrable under Section 2(f) of the Trademark Act. Any doubts as to either suggestiveness or secondary meaning should be resolved in favor of the Applicant. See In re Conductive Sys., Inc., 220 U.S.P.Q. 84, 86 (T.T.A.B. 1983); In re Merrill Lynch, Pierce, Fenner & Smith, Inc., 828 F.2d 1567, 4 U.S.P.Q.2d 1141 (Fed. Cir. 1987). Applicant's Mark should proceed to publication and registration, and such actions are respectfully requested.

Should the Examining Attorney have any remaining questions, the Examining Attorney is invited to telephone the undersigned at (617) 951-8284 or via e-mail at joshua.dalton@morganlewis.com.

Dated: May 26, 2015

Respectfully submitted,

Joshua M. Dalton Rachelle A. Dubow Lawrence T. Stanley, Jr. MORGAN, LEWIS & BOCKIUS LLP One Federal Street Boston, MA 02110 (617) 951-8000

Attorneys for the Applicant, Paint Nite LLC

#### AFFIDAVIT OF DAN HERMANN

- I, Dan Hermann, do hereby state and depose under oath as follows:
- 1. The statements made herein are based upon my personal knowledge.
- 2. I am the Co-founder and CEO of Paint Nite LLC ("Applicant").
- 3. I submit this affidavit in support of Applicant's application for registration of the marks PAINT NITE (Serial No. 86281869) and PAINT NITE DRINK CREATIVELY (and Design) (Serial No. 86282002).
- 4. Applicant was founded in 2012 as a new concept of blending two timeless pastimes (artistic painting and drinking cocktails) as a way to draw patrons into local restaurants and pubs on slower days with a unique opportunity to socialize and be creative.
- 5. PAINT NITE parties are held daily. The typical PAINT NITE party has approximately 25 people in attendance, lasts approximately two hours, and is led by a master local artist, who instructs the patrons and takes them from blank canvas to masterpiece.
- 6. Although most of the PAINT NITE parties occur in the evening, Applicant has used the PAINT NITE mark in connection with its social entertainment services at times of the day other than at "night." For example, Applicant has promoted and offered services to corporate clients interested in providing team building social events at conferences, meetings and corporate retreats during the day.
- 7. After coining the term "PAINT NITE" in 2012, Applicant created a campaign using this term to actively brand its entertainment services.
- 8. Since launching its business, Applicant has continuously and substantially exclusively used the mark PAINT NITE in connection with its services. Applicant has offered its PAINT NITE-branded services in over 1,000 worldwide cities and is actively offering its

services in approximately 975 cities across 160 metropolitan areas in six countries. Applicant hosts more than 4,800 events per month, with more than 150,000 people attending those events each month. Applicant has over 735 artists that lead the various PAINT NITE events around the world. Applicant has hosted events at several well-known restaurant chains across the United States, including Applebee's, TGI Friday's, Macaroni Grill, Bertucci's, Fox & Hound, and UNO.

- 9. Applicant's use of the PAINT NITE mark is reflected in a variety of marketing and promotional efforts, including online advertisements, such as AOL, Popsugar, PureWow, SparkPeople and Scripps. See Exhibit A (representative branded social media), Exhibit B (representative marketing emails), Exhibit C (representative Facebook Ads), and Exhibit D (representative online banner advertisements) (each of which is attached hereto).
- 10. In addition to promoting its PAINT NITE brand through advertisements, Applicant's website has also long promoted the PAINT NITE brand. Applicant has maintained a website since at least 2012, sample pages of which are attached hereto as Exhibit E. Applicant also has a strong social media presence, including a "main" Facebook page (with over 100,000 likes) and a "main" Twitter page (with over 3,000 followers), not to mention Applicant's local Facebook and Twitter pages in its various markets, which collectively have more than 371,004 likes on the Facebook pages and 27,304 followers on the Twitter pages.
- 11. All told, since 2012, Applicant has spent more than \$1.2 million dollars marketing its PAINT NITE-branded entertainment services, generating over \$31 million in revenue.
- 12. Applicant's vast marketing activities have garnered significant press, including television, print, and online. For example, Applicant's PAINT NITE services have been featured on MSN.com (over 54,000,000 unique monthly visitors), womenshealth.com (over 5,000,000 unique monthly visitors), BostonMagazine.com (over 300,000 unique monthly visitors),

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Women's Health magazine (circulation of over 1,500,000), The Boston Globe newspaper and website (over 4,000,000 unique monthly visitors online and print circulation over 200,000), BaltimoreSun.com (over 1,600,000 unique monthly visitors), Chicago Tribune newspaper and website (over 20,000,000 unique monthly visitors online and print circulation over 400,000), Miami Herald newspaper and website (over 15,000,000 unique monthly visitors online and print circulation of over 140,000), and various network affiliates across the country, including in Boston (MA), Roanoke (VA), Louisville (KY), Birmingham (AL), Salt Lake City (UT), and Honolulu (HI).

- 13. Applicant has had a significant impact on the lives of its employees, and master artists, and customers. In celebrating its third anniversary, certain employees, artists and customers participated in a video describing the impact Paint Nite has had. That video, which supports the strong brand recognition Applicant has generated, may be viewed at https://vimeo.com/127546132. The password is: PaintNite2015.
- 14. While there have been recent efforts by parties not associated with Applicant to use the PAINT NITE mark without Applicant's authorization, for the majority of the time since Applicant launched its PAINT NITE brand in 2012, it has enjoyed substantially exclusive use of that mark. In response to unauthorized third party uses of PAINT NITE (or PAINT NIGHT), Applicant has increased its efforts to protect and police its rights in its proprietary brand. More specifically, in the past two years, Applicant has sent approximately twenty cease and desist letters to companies using the marks PAINT NITE or PAINT NIGHT in connection with their social painting events. Those unauthorized third party uses include uses by Wicked Art Bar, Muse Paintbar, Paint & Create, Arlington Art Lounge, Drinkable Arts, and Jersey Shore Paint Party. No company that has received a cease and desist letter from Applicant has refused to

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cease use of the PAINT NITE mark, or challenged Applicant's rights in or to its proprietary PAINT NITE mark.

I declare under the penalty of perjury under the laws of the Commonwealth of Massachusetts and the United States of America that the foregoing is true and correct.

Executed this 22<sup>nd</sup> day of May \_\_, 2015 at Boston, Massachusetts.

Dan Hexmann

#### **EXHIBIT A**











....> RULE #1



••> RULE #2

# OUU W!

•••> RULE #3







# **CHEERS TO YOU, PITTSBURGH!**



# **PARTY**

with
Paint Nite at
Rivers Casino\*

APRIL 10, 2015

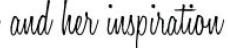






\* Must be 21 or older to be on Rivers Casino property.

# Paint Nite Featured Artist OCTOBER and her inspiration





·····Miami





PaintNite.com

#### **EXHIBIT B**







Looking for something green to wear this St. Paddy's Day? We've got just the thing a Paint Nite apron! Join us during the week of March 16th and GET YOUR GREEN ON at Paint Nite!

FIND AN EVENT



40% OFF during March with coupon code

THINKSPRING40

Show us your pics from Paint Nite on Instagram! #PAINTNITE #DRINKCREATIVELY

















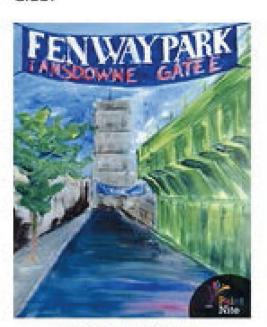




## **READY FOR SOME BASEBALL?**

#### DON'T MISS OUT Red Sox Nation!

Baseball season is around the corner and what better way to welcome it than Paint Nite at Fenway? Join us on **Saturday**, **April 18th**, for the Red Sox vs. Orioles game followed by Paint Nite at the Champions Club!



LANSDOWNE STREET You will be painting this!



#### SATURDAY | 4/18/2015

Time: Game at 4:05 PM, painting post-game at 7:30 PM

Price: \$75 for painting & admission to the game!

**GET TICKETS** 





# Spring IS IN FULL BLOOM

#### Forget April Showers!

Add a pop of color to your spring instead! Get inspired with this month's featured paintings.

FIND AN EVENT



Use code **BLOOM40** and get **40% OFF!**One week only – coupon code expires 4/9/15

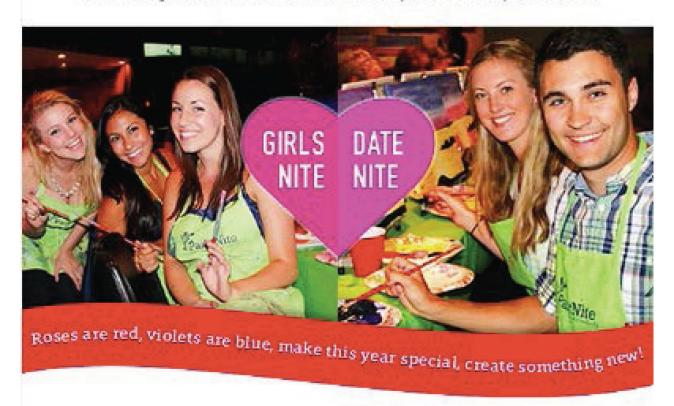
FIND AN EVENT



FEBRUARY 14, 2015!

### Get creative with your Valentine's Day!

Whether you've got a hot date or are hitting the town with the girls. Paint Nite will make your holiday sweeter!



Get 40% off with coupon code XOXO

**BUY NOW** 

Coupon code expires 2/15/2015



# Give the gift of a CREATIVE NITE OUT!

Here's a last-minute discount for the perfect last-minute gift!

Offer valid now through January 1st at midnight!\*



**BUY NOW** 

\*Offer valid now through 01/01/2015 at midnight EST. Available everywhere in the US and Canada, excluding New York. All tickets will be sold in U.S. dollars and local sales taxes will be applied at checkout.



#### Farewell Summer! Hello Fall!

We're celebrating with 40% off!



A new season... a blank canvas!

Reserve your spots now for September.

At 40% off... that's something to toast to!!

Use Promo Code: FALL4PN

**Book Now** 

We do Private and Corporate Events!









#### We think you deserve a little love for organizing the girls' night out!



ALEX AND ANI

(+) ENERGY

So for every 3 tickets you buy using Coupon Code VENUS we'll send you a free Alex and Ani bangle.



Coupon Code: VENUS

#### Treating Yourself Is So Easy!

Organize your friends and buy 3 tickets in one purchase. We'll then mail you a beautiful Alex and Ani bangle.

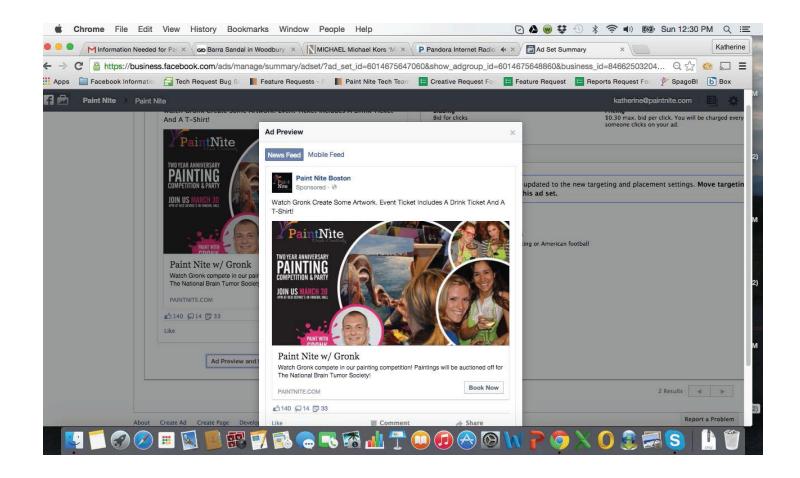
> And if that wasn't enough \_ we're giving you 30% off your ticket prices!

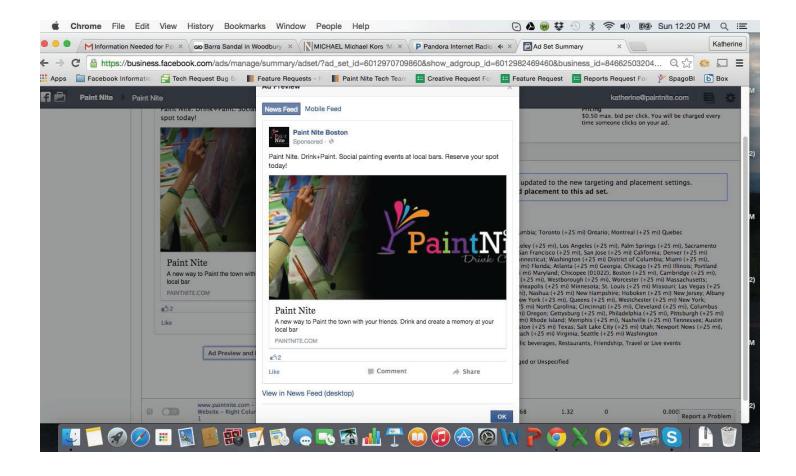
#### So what are you waiting for? Let's start planning!

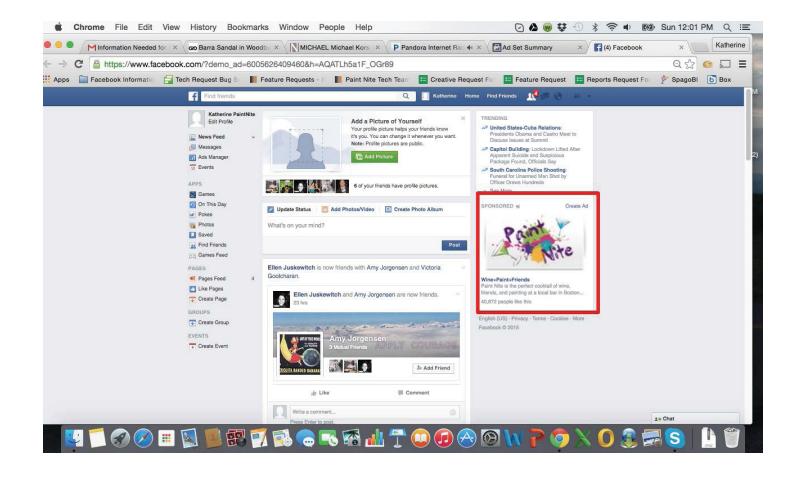
Offer closes Saturday, October 25th at midnight Pacific Time

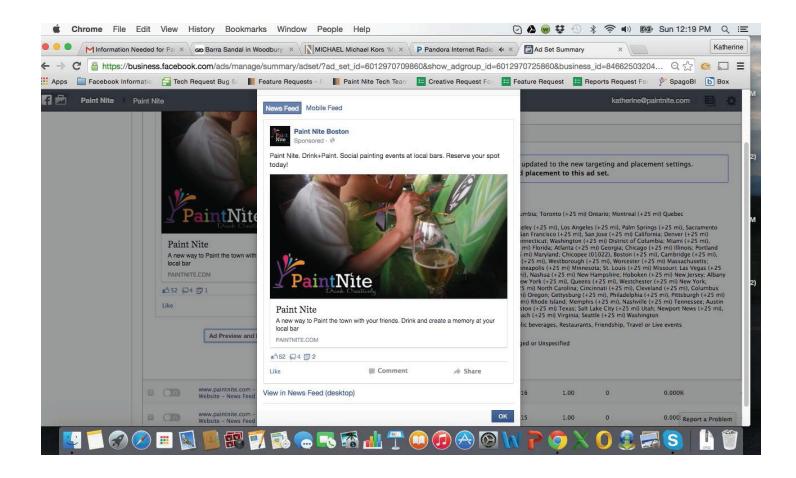


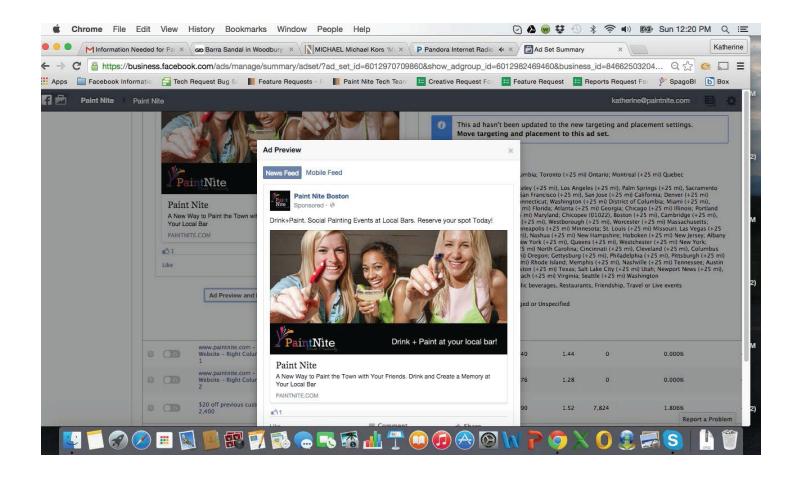
#### **EXHIBIT C**

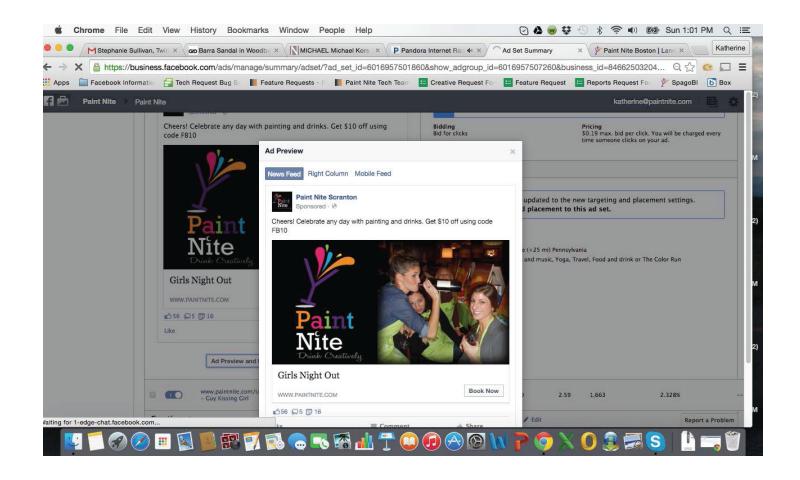


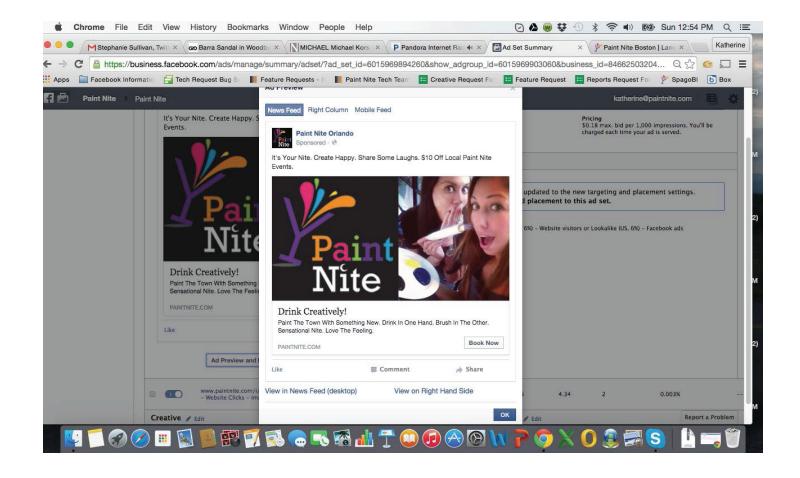












## **EXHIBIT D**



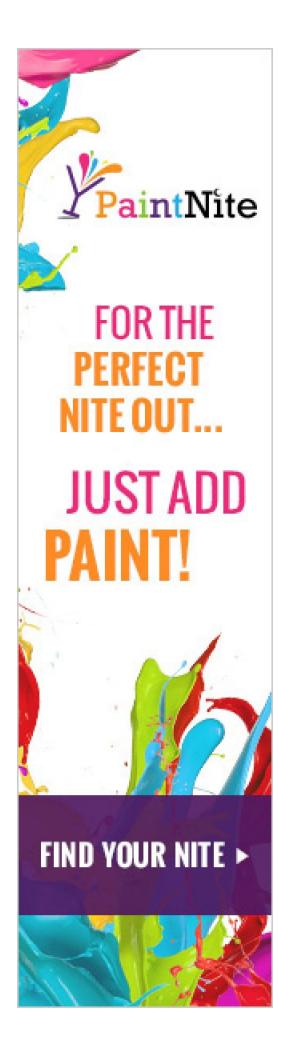




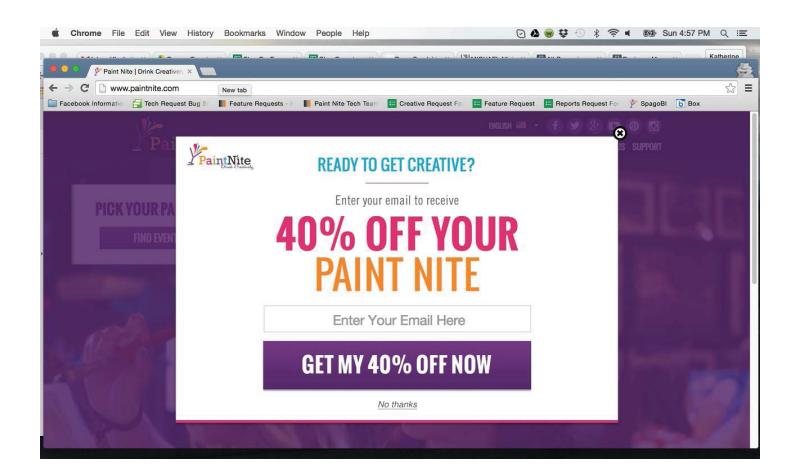


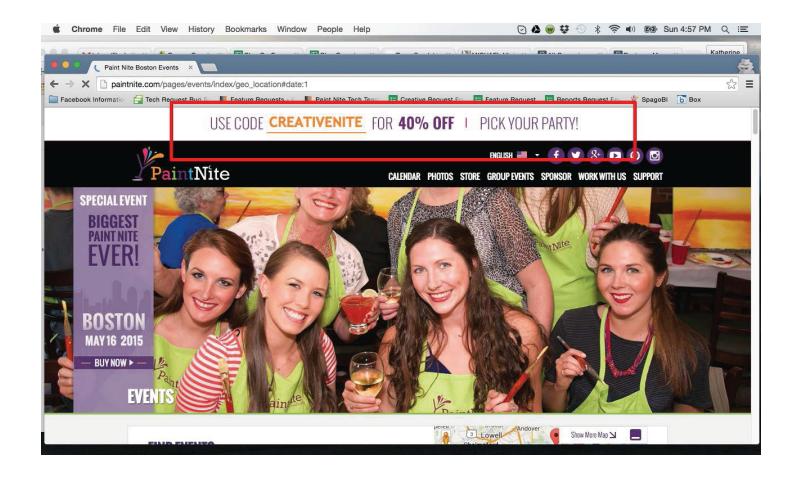


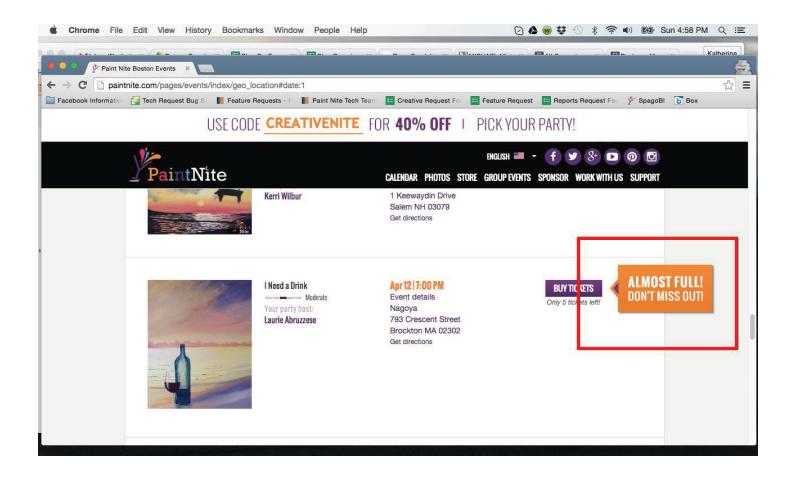




## **EXHIBIT E**







#### AFFIDAVIT OF LAWRENCE T. STANLEY, JR.

- I, Lawrence T. Stanley, Jr., do hereby state and depose under oath as follows:
- 1. The statements made herein are based upon my personal knowledge.
- 2. I am an associate with the law firm of Morgan, Lewis & Bockius LLP. I am counsel for Paint Nite LLC in this proceeding.
- I submit this affidavit in support of Applicant's application for registration of the marks PAINT NITE (Serial No. 86281869) and PAINT NITE DRINK CREATIVELY (and Design) (Serial No. 86282002).
- 4. Attached hereto as Exhibit A are true and accurate copies of registrations of marks that contain a combination of common words with the term "NIGHT" in Class 41, and that did not require a disclaimer of the term "NIGHT", namely:
  - COMBAT NIGHT Reg. No. 4,428,730 (Entertainment services in the nature of live mixed martial arts (MMA) events; Presentation of mixed martial arts (MMA) events);
  - MOTORCYCLE NIGHT Reg. No. 4,587,395 (Arranging, organizing, conducting and hosting social entertainment events for motorcycle enthusiasts);
  - GAME NIGHT Reg. No. 4,263,996 (Providing a web site featuring sporting information; Providing news and information in the field of sports);
  - FAMILY GAME NIGHT Reg. No. 4,260,207 ("Entertainment services, namely, an on-going television game show; entertainment services, namely, an on-going television game show segment");
  - FIGHT NIGHT Reg. No. 4,579,918 (Educational services, namely, conducting classes, seminars, conferences, workshops and simulcasts in the field of marriage,

and the distribution of course materials therewith; Entertainment services, namely, providing an ongoing radio program in the field of marriage; Entertainment services, namely, providing podcasts in the field of marriage; Entertainment, namely, a continuing talk show broadcast over radio, television and internet);

- EARTH NIGHT Reg. No. 4,504,271 (Arranging and conducting of concerts);
- SOUTHERN NIGHTS Reg. No. 4,365,546 (Entertainment services in the
  nature of continuing program series, featuring live action, comedy and drama
  provided through cable television, broadcast television, internet, video-ondemand, and through other distribution platforms; providing online information in
  the field of entertainment concerning television programs);
- HOLIWOOD NIGHTS Reg. No. 4,083,573 (Amusement park and theme park services; Amusement parks; Entertainment in the nature of an amusement park ride; Entertainment services in the nature of an amusement park attraction, namely, a themed area; Entertainment services in the nature of an amusement park show; Entertainment services, namely, arranging and conducting special events at an amusement park; Entertainment services, namely, arranging for ticket reservations for amusement park attractions; Providing amusement parks; Providing theme park services; Provision of information relating to amusement park shows);
- OCEAN NIGHT Reg. No. 4,601,326 (Entertainment media production services for motion pictures, television and Internet; Media production services, namely, video and film production; Production and distribution of television shows and

DB3/200213391.1 2

movies; Production of monoscopic and/or stereoscopic, electronic, digital video and/or film).

I declare under the penalty of perjury under the laws of the Commonwealth of Massachusetts and the United States of America that the foregoing is true and correct.

Executed this 26th day of May, 2015 at Boston, Massachusetts.

Lawrence T. Stanley, Jr

DB3/200213391.1 3

## **EXHIBIT A**

# Ocean Night

Reg. No. 4,601,326

Registered Sep. 9, 2014 1625 103 PL NE, APT. M2
BELLEVUE, WA 98004

Int. Cl.: 41

SERVICE MARK

PRINCIPAL REGISTER

STEELE, MICHAEL (UNITED STATES INDIVIDUAL)

FOR: ENTERTAINMENT MEDIA PRODUCTION SERVICES FOR MOTION PICTURES, TELEVISION AND INTERNET; MEDIA PRODUCTION SERVICES, NAMELY, VIDEO AND FILM PRODUCTION; PRODUCTION AND DISTRIBUTION OF TELEVISION SHOWS AND MOVIES; PRODUCTION OF MONOSCOPIC AND/OR STEREOSCOPIC, ELECTRONIC, DI-GITAL VIDEO AND/OR FILM, IN CLASS 41 (U.S. CLS. 100, 101 AND 107).

FIRST USE 2-7-2014; IN COMMERCE 2-7-2014.

THE MARK CONSISTS OF STANDARD CHARACTERS WITHOUT CLAIM TO ANY PAR-TICULAR FONT, STYLE, SIZE, OR COLOR.

SER. NO. 86-191,396, FILED 2-12-2014.

WILLIAM ROSSMAN, EXAMINING ATTORNEY



Michelle K. Zen Deputy Director of the United States

WARNING: YOUR REGISTRATION WILL BE CANCELLED IF YOU DO NOT FILE THE DOCUMENTS BELOW DURING THE SPECIFIED TIME PERIODS.

Requirements in the First Ten Years\* What and When to File:

First Filing Deadline: You must file a Declaration of Use (or Excusable Nonuse) between the 5th and 6th years after the registration date. See 15 U.S.C. §§1058, 1141k. If the declaration is accepted, the registration will continue in force for the remainder of the ten-year period, calculated from the registration date, unless cancelled by an order of the Commissioner for Trademarks or a federal court.

Second Filing Deadline: You must file a Declaration of Use (or Excusable Nonuse) and an Application for Renewal between the 9th and 10th years after the registration date.\*

See 15 U.S.C. §1059.

Requirements in Successive Ten-Year Periods\* What and When to File:

You must file a Declaration of Use (or Excusable Nonuse) and an Application for Renewal between every 9th and 10th-year period, calculated from the registration date.\*

#### Grace Period Filings\*

The above documents will be accepted as timely if filed within six months after the deadlines listed above with the payment of an additional fee.

The United States Patent and Trademark Office (USPTO) will NOT send you any future notice or reminder of these filing requirements.

\*ATTENTION MADRID PROTOCOL REGISTRANTS: The holder of an international registration with an extension of protection to the United States under the Madrid Protocol must timely file the Declarations of Use (or Excusable Nonuse) referenced above directly with the USPTO. The time periods for filing are based on the U.S. registration date (not the international registration date). The deadlines and grace periods for the Declarations of Use (or Excusable Nonuse) are identical to those for nationally issued registrations. See 15 U.S.C. §§1058, 1141k. However, owners of international registrations do not file renewal applications at the USPTO. Instead, the holder must file a renewal of the underlying international registration at the International Bureau of the World Intellectual Property Organization, under Article 7 of the Madrid Protocol, before the expiration of each ten-year term of protection, calculated from the date of the international registration, See 15 U.S.C. §1141j. For more information and renewal forms for the international registration, see http://www.wipo.int/madrid/en/.

NOTE: Fees and requirements for maintaining registrations are subject to change. Please check the USPTO website for further information. With the exception of renewal applications for registered extensions of protection, you can file the registration maintenance documents referenced above online at http://www.uspto.gov.

Page: 2 / RN # 4,601,326

## **COMBAT NIGHT**

Reg. No. 4,428,730 CHAMALE, MITCHELL (UNITED STATES INDIVIDUAL)

Registered Nov. 5, 2013 I701 LEE ROAD APTM401 ORLANDO, FL 32789 AND

Int. Cl.: 41 SAMMAN, JOSH (UNITED STATES INDIVIDUAL)

1701 LEE ROAD APTM401 ORLANDO, FL 32789

SERVICE MARK

FOR: ENTERTAINMENT SERVICES IN THE NATURE OF LIVE MIXED MARTIAL ARTS PRINCIPAL REGISTER (MMA) EVENTS; PRESENTATION OF MIXED MARTIAL ARTS (MMA) EVENTS, IN CLASS

41 (U.S. CLS. 100, 101 AND 107).

FIRST USE 1-1-2012; IN COMMERCE 1-1-2012.

THE MARK CONSISTS OF STANDARD CHARACTERS WITHOUT CLAIM TO ANY PAR-TICULAR FONT, STYLE, SIZE, OR COLOR.

NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "COMBAT", APART FROM

THE MARK AS SHOWN.

SER. NO. 85-884,913, FILED 3-25-2013.

LEIGH LOWRY, EXAMINING ATTORNEY



WARNING: YOUR REGISTRATION WILL BE CANCELLED IF YOU DO NOT FILE THE DOCUMENTS BELOW DURING THE SPECIFIED TIME PERIODS.

Requirements in the First Ten Years\* What and When to File:

First Filing Deadline: You must file a Declaration of Use (or Excusable Nonuse) between the 5th and 6th years after the registration date. See 15 U.S.C. §§1058, 1141k. If the declaration is accepted, the registration will continue in force for the remainder of the ten-year period, calculated from the registration date, unless cancelled by an order of the Commissioner for Trademarks or a federal court.

Second Filing Deadline: You must file a Declaration of Use (or Excusable Nonuse) and an Application for Renewal between the 9th and 10th years after the registration date.\*

See 15 U.S.C. §1059.

Requirements in Successive Ten-Year Periods\* What and When to File:

You must file a Declaration of Use (or Excusable Nonuse) and an Application for Renewal between every 9th and 10th-year period, calculated from the registration date.\*

#### Grace Period Filings\*

The above documents will be accepted as timely if filed within six months after the deadlines listed above with the payment of an additional fee.

The United States Patent and Trademark Office (USPTO) will NOT send you any future notice or reminder of these filing requirements.

\*ATTENTION MADRID PROTOCOL REGISTRANTS: The holder of an international registration with an extension of protection to the United States under the Madrid Protocol must timely file the Declarations of Use (or Excusable Nonuse) referenced above directly with the USPTO. The time periods for filing are based on the U.S. registration date (not the international registration date). The deadlines and grace periods for the Declarations of Use (or Excusable Nonuse) are identical to those for nationally issued registrations. See 15 U.S.C. §§1058, 1141k. However, owners of international registrations do not file renewal applications at the USPTO. Instead, the holder must file a renewal of the underlying international registration at the International Bureau of the World Intellectual Property Organization, under Article 7 of the Madrid Protocol, before the expiration of each ten-year term of protection, calculated from the date of the international registration, See 15 U.S.C. §1141j. For more information and renewal forms for the international registration, see http://www.wipo.int/madrid/en/.

NOTE: Fees and requirements for maintaining registrations are subject to change. Please check the USPTO website for further information. With the exception of renewal applications for registered extensions of protection, you can file the registration maintenance documents referenced above online at http://www.uspto.gov.

Page: 2 / RN # 4,428,730

## MOTORCYCLE NIGHT

Reg. No. 4,587,395 MUNROE, STEVE (UNITED STATES INDIVIDUAL)

Registered Aug. 19, 2014 TOWNSEND, MA 01469

Int. Cls.: 25, 35 and 41 FOR: APPAREL, NAMELY, JACKETS, COATS, CAPS, T-SHIRTS, AND SWEATSHIRTS, IN

CLASS 25 (U.S. CLS. 22 AND 39).

TRADEMARK FIRST USE 5-1-1997; IN COMMERCE 5-1-1997.

SERVICE MARK FOR: CLUB SERVICES PROMOTING THE INTERESTS OF MOTORCYCLE ENTHUSIASTS;

ARRANGING, ORGANIZING, CONDUCTING AND HOSTING SPECIAL EVENTS FOR COMMERCIAL OR PROMOTIONAL PURPOSES FOR MOTORCYCLE ENTHUSIASTS, IN

PRINCIPAL REGISTER COMMERCIAL OR PROMOTIONAL PUI CLASS 35 (U.S. CLS. 100, 101 AND 102).

FIRST USE 5-1-1997; IN COMMERCE 5-1-1997.

FOR: ARRANGING, ORGANIZING, CONDUCTING AND HOSTING SOCIAL ENTERTAINMENT EVENTS FOR MOTORCYCLE ENTHUSIASTS, IN CLASS 41 (U.S. CLS. 100, 101 AND

107).

FIRST USE 5-1-1997; IN COMMERCE 5-1-1997.

THE MARK CONSISTS OF STANDARD CHARACTERS WITHOUT CLAIM TO ANY PARTICULAR FONT, STYLE, SIZE, OR COLOR.

NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "MOTORCYCLE", APART FROM THE MARK AS SHOWN.

SER. NO. 86-042,866, FILED 8-20-2013.

GINA HAYES, EXAMINING ATTORNEY

Deputy Director of the United States

WARNING: YOUR REGISTRATION WILL BE CANCELLED IF YOU DO NOT FILE THE DOCUMENTS BELOW DURING THE SPECIFIED TIME PERIODS.

Requirements in the First Ten Years\* What and When to File:

First Filing Deadline: You must file a Declaration of Use (or Excusable Nonuse) between the 5th and 6th years after the registration date. See 15 U.S.C. §§1058, 1141k. If the declaration is accepted, the registration will continue in force for the remainder of the ten-year period, calculated from the registration date, unless cancelled by an order of the Commissioner for Trademarks or a federal court.

Second Filing Deadline: You must file a Declaration of Use (or Excusable Nonuse) and an Application for Renewal between the 9th and 10th years after the registration date.\*

See 15 U.S.C. §1059.

Requirements in Successive Ten-Year Periods\* What and When to File:

You must file a Declaration of Use (or Excusable Nonuse) and an Application for Renewal between every 9th and 10th-year period, calculated from the registration date.\*

#### Grace Period Filings\*

The above documents will be accepted as timely if filed within six months after the deadlines listed above with the payment of an additional fee.

The United States Patent and Trademark Office (USPTO) will NOT send you any future notice or reminder of these filing requirements.

\*ATTENTION MADRID PROTOCOL REGISTRANTS: The holder of an international registration with an extension of protection to the United States under the Madrid Protocol must timely file the Declarations of Use (or Excusable Nonuse) referenced above directly with the USPTO. The time periods for filing are based on the U.S. registration date (not the international registration date). The deadlines and grace periods for the Declarations of Use (or Excusable Nonuse) are identical to those for nationally issued registrations. See 15 U.S.C. §§1058, 1141k. However, owners of international registrations do not file renewal applications at the USPTO. Instead, the holder must file a renewal of the underlying international registration at the International Bureau of the World Intellectual Property Organization, under Article 7 of the Madrid Protocol, before the expiration of each ten-year term of protection, calculated from the date of the international registration, See 15 U.S.C. §1141j. For more information and renewal forms for the international registration, see http://www.wipo.int/madrid/en/.

NOTE: Fees and requirements for maintaining registrations are subject to change. Please check the USPTO website for further information. With the exception of renewal applications for registered extensions of protection, you can file the registration maintenance documents referenced above online at http://www.uspto.gov.

Page: 2 / RN # 4,587,395

# Game Night

Reg. No. 4,263,996 ROBERT HENSON (UNITED STATES INDIVIDUAL)

Registered Dec. 25, 2012 TORRANCE, CA 90503

Int. Cls.: 16 and 41 FOR: BOOKS IN THE FIELD OF SPORTS; MAGAZINES IN THE FIELD OF SPORTS;

NEWSLETTERS IN THE FIELD OF SPORTS; NEWSPAPERS IN THE FIELD OF SPORTS; PAMPHLETS IN THE FIELD OF SPORTS; PHOTOGRAPHS, IN CLASS 16 (U.S. CLS. 2, 5,

TRADEMARK 22, 23, 29, 37, 38 AND 50).

SERVICE MARK FIRST USE 8-26-2005; IN COMMERCE 8-26-2005.

PRINCIPAL REGISTER FOR: PROVIDING A WEB SITE FEATURING SPORTING INFORMATION; PROVIDING

NEWS AND INFORMATION IN THE FIELD OF SPORTS, IN CLASS 41 (U.S. CLS. 100, 101

AND 107).

FIRST USE 8-0-2005; IN COMMERCE 8-0-2005.

THE MARK CONSISTS OF STANDARD CHARACTERS WITHOUT CLAIM TO ANY PAR-

TICULAR FONT, STYLE, SIZE, OR COLOR.

SER. NO. 85-615,687, FILED 5-3-2012.

GILBERT SWIFT, EXAMINING ATTORNEY



Director of the United States Patent and Trademark Office

WARNING: YOUR REGISTRATION WILL BE CANCELLED IF YOU DO NOT FILE THE DOCUMENTS BELOW DURING THE SPECIFIED TIME PERIODS.

Requirements in the First Ten Years\* What and When to File:

First Filing Deadline: You must file a Declaration of Use (or Excusable Nonuse) between the 5th and 6th years after the registration date. See 15 U.S.C. §§1058, 1141k. If the declaration is accepted, the registration will continue in force for the remainder of the ten-year period, calculated from the registration date, unless cancelled by an order of the Commissioner for Trademarks or a federal court.

Second Filing Deadline: You must file a Declaration of Use (or Excusable Nonuse) and an Application for Renewal between the 9th and 10th years after the registration date.\*

See 15 U.S.C. §1059.

Requirements in Successive Ten-Year Periods\* What and When to File:

You must file a Declaration of Use (or Excusable Nonuse) and an Application for Renewal between every 9th and 10th-year period, calculated from the registration date.\*

#### Grace Period Filings\*

The above documents will be accepted as timely if filed within six months after the deadlines listed above with the payment of an additional fee.

The United States Patent and Trademark Office (USPTO) will NOT send you any future notice or reminder of these filing requirements.

\*ATTENTION MADRID PROTOCOL REGISTRANTS: The holder of an international registration with an extension of protection to the United States under the Madrid Protocol must timely file the Declarations of Use (or Excusable Nonuse) referenced above directly with the USPTO. The time periods for filing are based on the U.S. registration date (not the international registration date). The deadlines and grace periods for the Declarations of Use (or Excusable Nonuse) are identical to those for nationally issued registrations. See 15 U.S.C. §§1058, 1141k. However, owners of international registrations do not file renewal applications at the USPTO. Instead, the holder must file a renewal of the underlying international registration at the International Bureau of the World Intellectual Property Organization, under Article 7 of the Madrid Protocol, before the expiration of each ten-year term of protection, calculated from the date of the international registration, See 15 U.S.C. §1141j. For more information and renewal forms for the international registration, see http://www.wipo.int/madrid/en/.

NOTE: Fees and requirements for maintaining registrations are subject to change. Please check the USPTO website for further information. With the exception of renewal applications for registered extensions of protection, you can file the registration maintenance documents referenced above online at http://www.uspto.gov.

Page: 2 / RN # 4,263,996

# FIGHT NIGHT

Reg. No. 4,579,918

THE FOUNDATION FOR HEALTHY RELATIONSHIPS (WASHINGTON NON-PROFIT

Registered Aug. 5, 2014

CORPORATION) ? LES PARROTT

Int. Cls.: 9, 16 and 41

2121 TERRY AVENUE, #1700

SEATTLE, WA 98121

TRADEMARK

FOR: AUDIO RECORDINGS FEATURING TEACHINGS ON MARRIAGE; DIGITAL MATERIALS, NAMELY, AUDIO CDS, DVDS AND DOWNLOADABLE AUDIO AND VIDEO FILES

SERVICE MARK

FEATURING TEACHING IN THE FIELD OF MARRIAGE; DOWNLOADABLE PODCASTS

IN THE FIELD OF MARRIAGE, IN CLASS 9 (U.S. CLS. 21, 23, 26, 36 AND 38).

PRINCIPAL REGISTER

FIRST USE 2-10-2012; IN COMMERCE 2-10-2012.

FOR: A SERIES OF BOOKS, WRITTEN ARTICLES, HANDOUTS AND WORKSHEETS IN THE FIELD OF MARRIAGE; PUBLICATIONS, NAMELY, BROCHURES, BOOKLETS, AND TEACHING MATERIALS IN THE FIELD OF MARRIAGE; WORKBOOKS DIRECTED TO THE FIELD OF MARRIAGE, IN CLASS 16 (U.S. CLS. 2, 5, 22, 23, 29, 37, 38 AND 50).

FIRST USE 2-10-2012; IN COMMERCE 2-10-2012.

FOR: EDUCATIONAL SERVICES, NAMELY, CONDUCTING CLASSES, SEMINARS, CON-FERENCES, WORKSHOPS AND SIMULCASTS IN THE FIELD OF MARRIAGE, AND THE DISTRIBUTION OF COURSE MATERIALS THEREWITH; ENTERTAINMENT SERVICES, DISTRIBUTION OF COURSE MATERIALS THEREWITH; ENTERTAINMENT SERVICES, NAMELY, PROVIDING AN ONGOING RADIO PROGRAM IN THE FIELD OF MARRIAGE; ENTERTAINMENT SERVICES, NAMELY, PROVIDING PODCASTS IN THE FIELD OF MARRIAGE; ENTERTAINMENT, NAMELY, A CONTINUING TALK SHOW BROADCAST OVER RADIO, TELEVISION AND INTERNET, IN CLASS 41 (U.S. CLS. 100, 101 AND 107).

FIRST USE 2-10-2012: IN COMMERCE 2-10-2012.

THE MARK CONSISTS OF STANDARD CHARACTERS WITHOUT CLAIM TO ANY PAR-TICULAR FONT, STYLE, SIZE, OR COLOR.

Michelle K. Zen

SER. NO. 86-161,777, FILED 1-9-2014.

Deputy Director of the United States

EVELYN BRADLEY, EXAMINING ATTORNEY

WARNING: YOUR REGISTRATION WILL BE CANCELLED IF YOU DO NOT FILE THE DOCUMENTS BELOW DURING THE SPECIFIED TIME PERIODS.

Requirements in the First Ten Years\* What and When to File:

First Filing Deadline: You must file a Declaration of Use (or Excusable Nonuse) between the 5th and 6th years after the registration date. See 15 U.S.C. §§1058, 1141k. If the declaration is accepted, the registration will continue in force for the remainder of the ten-year period, calculated from the registration date, unless cancelled by an order of the Commissioner for Trademarks or a federal court.

Second Filing Deadline: You must file a Declaration of Use (or Excusable Nonuse) and an Application for Renewal between the 9th and 10th years after the registration date.\*

See 15 U.S.C. §1059.

Requirements in Successive Ten-Year Periods\* What and When to File:

You must file a Declaration of Use (or Excusable Nonuse) and an Application for Renewal between every 9th and 10th-year period, calculated from the registration date.\*

#### Grace Period Filings\*

The above documents will be accepted as timely if filed within six months after the deadlines listed above with the payment of an additional fee.

The United States Patent and Trademark Office (USPTO) will NOT send you any future notice or reminder of these filing requirements.

\*ATTENTION MADRID PROTOCOL REGISTRANTS: The holder of an international registration with an extension of protection to the United States under the Madrid Protocol must timely file the Declarations of Use (or Excusable Nonuse) referenced above directly with the USPTO. The time periods for filing are based on the U.S. registration date (not the international registration date). The deadlines and grace periods for the Declarations of Use (or Excusable Nonuse) are identical to those for nationally issued registrations. See 15 U.S.C. §§1058, 1141k. However, owners of international registrations do not file renewal applications at the USPTO. Instead, the holder must file a renewal of the underlying international registration at the International Bureau of the World Intellectual Property Organization, under Article 7 of the Madrid Protocol, before the expiration of each ten-year term of protection, calculated from the date of the international registration, See 15 U.S.C. §1141j. For more information and renewal forms for the international registration, see http://www.wipo.int/madrid/en/.

NOTE: Fees and requirements for maintaining registrations are subject to change. Please check the USPTO website for further information. With the exception of renewal applications for registered extensions of protection, you can file the registration maintenance documents referenced above online at http://www.uspto.gov.

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# Earth Night

Reg. No. 4,504,271

EARTH NIGHT, LLC (TEXAS LIMITED LIABILITY COMPANY)

Registered Apr. 1, 2014

3006 WOODSIDE ST DALLAS, TX 75204

Int. Cls.: 25 and 41

FOR: SHIRTS, IN CLASS 25 (U.S. CLS. 22 AND 39).

TRADEMARK

FIRST USE 1-19-2013; IN COMMERCE 3-1-2013.

SERVICE MARK

FOR: ARRANGING AND CONDUCTING OF CONCERTS, IN CLASS 41 (U.S. CLS. 100, 101

AND 107

PRINCIPAL REGISTER

FIRST USE 1-19-2013; IN COMMERCE 3-1-2013.

THE MARK CONSISTS OF STANDARD CHARACTERS WITHOUT CLAIM TO ANY PAR-

TICULAR FONT, STYLE, SIZE, OR COLOR.

SER. NO. 85-883,925, FILED 3-22-2013.

ELISSA GARBER KON, EXAMINING ATTORNEY



Michelle K. Zee Deputy Director of the United States Patent and Trademark Office

WARNING: YOUR REGISTRATION WILL BE CANCELLED IF YOU DO NOT FILE THE DOCUMENTS BELOW DURING THE SPECIFIED TIME PERIODS.

Requirements in the First Ten Years\* What and When to File:

First Filing Deadline: You must file a Declaration of Use (or Excusable Nonuse) between the 5th and 6th years after the registration date. See 15 U.S.C. §§1058, 1141k. If the declaration is accepted, the registration will continue in force for the remainder of the ten-year period, calculated from the registration date, unless cancelled by an order of the Commissioner for Trademarks or a federal court.

Second Filing Deadline: You must file a Declaration of Use (or Excusable Nonuse) and an Application for Renewal between the 9th and 10th years after the registration date.\*

See 15 U.S.C. §1059.

Requirements in Successive Ten-Year Periods\* What and When to File:

You must file a Declaration of Use (or Excusable Nonuse) and an Application for Renewal between every 9th and 10th-year period, calculated from the registration date.\*

#### Grace Period Filings\*

The above documents will be accepted as timely if filed within six months after the deadlines listed above with the payment of an additional fee.

The United States Patent and Trademark Office (USPTO) will NOT send you any future notice or reminder of these filing requirements.

\*ATTENTION MADRID PROTOCOL REGISTRANTS: The holder of an international registration with an extension of protection to the United States under the Madrid Protocol must timely file the Declarations of Use (or Excusable Nonuse) referenced above directly with the USPTO. The time periods for filing are based on the U.S. registration date (not the international registration date). The deadlines and grace periods for the Declarations of Use (or Excusable Nonuse) are identical to those for nationally issued registrations. See 15 U.S.C. §§1058, 1141k. However, owners of international registrations do not file renewal applications at the USPTO. Instead, the holder must file a renewal of the underlying international registration at the International Bureau of the World Intellectual Property Organization, under Article 7 of the Madrid Protocol, before the expiration of each ten-year term of protection, calculated from the date of the international registration. See 15 U.S.C. §1141j. For more information and renewal forms for the international registration, see http://www.wipo.int/madrid/en/.

NOTE: Fees and requirements for maintaining registrations are subject to change. Please check the USPTO website for further information. With the exception of renewal applications for registered extensions of protection, you can file the registration maintenance documents referenced above online at http://www.uspto.gov.

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## SOUTHERN NIGHTS

Reg. No. 4,365,546

COUNTRY MUSIC TELEVISION, INC. (TENNESSEE CORPORATION) 1515 BROADWAY

Registered July 9, 2013 NEW YORK, NY 10036

Int. Cl.: 41

SERVICE MARK

FOR: ENTERTAINMENT SERVICES IN THE NATURE OF CONTINUING PROGRAM SERIES, FEATURING LIVE ACTION, COMEDY AND DRAMA PROVIDED THROUGH CABLE TELEVISION, BROADCAST TELEVISION, INTERNET, VIDEO-ON-DEMAND, AND THROUGH OTHER DISTRIBUTION PLATFORMS; PROVIDING ONLINE INFORMATION IN THE FIELD OF ENTERTAINMENT CONCERNING TELEVISION PROGRAMS, IN CLASS 41 (U.S. CLS. 100, 101 AND 107).

PRINCIPAL REGISTER

FIRST USE 4-7-2012; IN COMMERCE 4-7-2012.

THE MARK CONSISTS OF STANDARD CHARACTERS WITHOUT CLAIM TO ANY PAR-

TICULAR FONT, STYLE, SIZE, OR COLOR.

SN 85-568,344, FILED 3-13-2012.

SUE LAWRENCE, EXAMINING ATTORNEY



WARNING: YOUR REGISTRATION WILL BE CANCELLED IF YOU DO NOT FILE THE DOCUMENTS BELOW DURING THE SPECIFIED TIME PERIODS.

Requirements in the First Ten Years\* What and When to File:

First Filing Deadline: You must file a Declaration of Use (or Excusable Nonuse) between the 5th and 6th years after the registration date. See 15 U.S.C. §§1058, 1141k. If the declaration is accepted, the registration will continue in force for the remainder of the ten-year period, calculated from the registration date, unless cancelled by an order of the Commissioner for Trademarks or a federal court.

Second Filing Deadline: You must file a Declaration of Use (or Excusable Nonuse) and an Application for Renewal between the 9th and 10th years after the registration date.\*

See 15 U.S.C. §1059.

Requirements in Successive Ten-Year Periods\* What and When to File:

You must file a Declaration of Use (or Excusable Nonuse) and an Application for Renewal between every 9th and 10th-year period, calculated from the registration date.\*

#### Grace Period Filings\*

The above documents will be accepted as timely if filed within six months after the deadlines listed above with the payment of an additional fee.

The United States Patent and Trademark Office (USPTO) will NOT send you any future notice or reminder of these filing requirements.

\*ATTENTION MADRID PROTOCOL REGISTRANTS: The holder of an international registration with an extension of protection to the United States under the Madrid Protocol must timely file the Declarations of Use (or Excusable Nonuse) referenced above directly with the USPTO. The time periods for filing are based on the U.S. registration date (not the international registration date). The deadlines and grace periods for the Declarations of Use (or Excusable Nonuse) are identical to those for nationally issued registrations. See 15 U.S.C. §§1058, 1141k. However, owners of international registrations do not file renewal applications at the USPTO. Instead, the holder must file a renewal of the underlying international registration at the International Bureau of the World Intellectual Property Organization, under Article 7 of the Madrid Protocol, before the expiration of each ten-year term of protection, calculated from the date of the international registration, See 15 U.S.C. §1141j. For more information and renewal forms for the international registration, see http://www.wipo.int/madrid/en/.

NOTE: Fees and requirements for maintaining registrations are subject to change. Please check the USPTO website for further information. With the exception of renewal applications for registered extensions of protection, you can file the registration maintenance documents referenced above online at http://www.uspto.gov.

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# HoliWood Nights

Reg. No. 4,083,573

KOCH DEVELOPMENT CORPORATION (INDIANA CORPORATION)

Registered Jan. 10, 2012 SANTA CLAUS, IN 47579

452 E. CHRISTMAS BOULEVARD

Int. Cl.: 41

SERVICE MARK

PRINCIPAL REGISTER

FOR: AMUSEMENT PARK AND THEME PARK SERVICES; AMUSEMENT PARKS; ENTERTAINMENT IN THE NATURE OF AN AMUSEMENT PARK RIDE; ENTERTAINMENT SERVICES IN THE NATURE OF AN AMUSEMENT PARK ATTRACTION, NAMELY, A THEMED AREA; ENTERTAINMENT SERVICES IN THE NATURE OF AN AMUSEMENT PARK SHOW; ENTERTAINMENT SERVICES, NAMELY, ARRANGING AND CONDUCTING SPECIAL EVENTS AT AN AMUSEMENT PARK; ENTERTAINMENT SERVICES, NAMELY, ARRANGING FOR TICKET RESERVATIONS FOR AMUSEMENT PARK ATTRACTIONS; PROVIDING AMUSEMENT PARKS; PROVIDING THEME PARK SERVICES; PROVISION OF INFORMATION RELATING TO AMUSEMENT PARK SHOWS, IN CLASS 41 (U.S. CLS. 100, 101 AND 107).

FIRST USE 11-1-2005; IN COMMERCE 11-1-2005.

THE MARK CONSISTS OF STANDARD CHARACTERS WITHOUT CLAIM TO ANY PARTICULAR FONT, STYLE, SIZE, OR COLOR.

SER. NO. 85-334,748, FILED 6-1-2011.

AISHA CLARKE, EXAMINING ATTORNEY



Director of the United States Patent and Trademark Office

Director of the United States Patent and Trademark Office

WARNING: YOUR REGISTRATION WILL BE CANCELLED IF YOU DO NOT FILE THE DOCUMENTS BELOW DURING THE SPECIFIED TIME PERIODS.

Requirements in the First Ten Years\* What and When to File:

First Filing Deadline: You must file a Declaration of Use (or Excusable Nonuse) between the 5th and 6th years after the registration date. See 15 U.S.C. §§1058, 1141k. If the declaration is accepted, the registration will continue in force for the remainder of the ten-year period, calculated from the registration date, unless cancelled by an order of the Commissioner for Trademarks or a federal court.

Second Filing Deadline: You must file a Declaration of Use (or Excusable Nonuse) and an Application for Renewal between the 9th and 10th years after the registration date.\*

See 15 U.S.C. §1059.

Requirements in Successive Ten-Year Periods\* What and When to File:

You must file a Declaration of Use (or Excusable Nonuse) and an Application for Renewal between every 9th and 10th-year period, calculated from the registration date.\*

#### Grace Period Filings\*

The above documents will be accepted as timely if filed within six months after the deadlines listed above with the payment of an additional fee.

The United States Patent and Trademark Office (USPTO) will NOT send you any future notice or reminder of these filing requirements.

\*ATTENTION MADRID PROTOCOL REGISTRANTS: The holder of an international registration with an extension of protection to the United States under the Madrid Protocol must timely file the Declarations of Use (or Excusable Nonuse) referenced above directly with the USPTO. The time periods for filing are based on the U.S. registration date (not the international registration date). The deadlines and grace periods for the Declarations of Use (or Excusable Nonuse) are identical to those for nationally issued registrations. See 15 U.S.C. §§1058, 1141k. However, owners of international registrations do not file renewal applications at the USPTO. Instead, the holder must file a renewal of the underlying international registration at the International Bureau of the World Intellectual Property Organization, under Article 7 of the Madrid Protocol, before the expiration of each ten-year term of protection, calculated from the date of the international registration. See 15 U.S.C. §1141j. For more information and renewal forms for the international registration, see http://www.wipo.int/madrid/en/.

NOTE: Fees and requirements for maintaining registrations are subject to change. Please check the USPTO website for further information. With the exception of renewal applications for registered extensions of protection, you can file the registration maintenance documents referenced above online at http://www.uspto.gov.

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Reg. No. 4,260,207

HASBRO, INC. (RHODE ISLAND CORPORATION) 1027 NEWPORT AVENUE

Registered Dec. 18, 2012 PAWTUCKET, RI 02862

Int. Cl.: 41

FOR: ENTERTAINMENT SERVICES, NAMELY, AN ON-GOING TELEVISION GAME SHOW; ENTERTAINMENT SERVICES, NAMELY, AN ON-GOING TELEVISION GAME SHOW

SEGMENT, IN CLASS 41 (U.S. CLS. 100, 101 AND 107).

SERVICE MARK

FIRST USE 10-10-2010; IN COMMERCE 10-10-2010.

PRINCIPAL REGISTER

OWNER OF U.S. REG. NO. 2,242,143.

NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "GAME", APART FROM THE

MARK AS SHOWN.

THE MARK CONSISTS OF THE WORDS "FAMILY GAME NIGHT", ALL ENCLOSED WITHIN A HOUSE-SHAPED DRAWING WITH A DIE-SHAPED CHIMNEY, AND IN WHICH THE WORD "FAMILY" HAS A DRAWING OF A DOG OVER THE LETTER "A" AND A LETTER "I" REPRESENTED BY AN HOURGLASS; THE WORD "GAME" HAS A LETTER "E" STYLIZED AS A CUBE-SHAPED LETTER; AND THE WORD "NIGHT" HAS A LETTER

"I" REPRESENTED BY A GAME PIECE.

SEC. 2(F).

SER. NO. 85-455,626, FILED 10-25-2011.

HOWARD SMIGA, EXAMINING ATTORNEY

WARNING: YOUR REGISTRATION WILL BE CANCELLED IF YOU DO NOT FILE THE DOCUMENTS BELOW DURING THE SPECIFIED TIME PERIODS.

Requirements in the First Ten Years\*
What and When to File:

First Filing Deadline: You must file a Declaration of Use (or Excusable Nonuse) between the 5th and 6th years after the registration date. See 15 U.S.C. §§1058, 1141k. If the declaration is accepted, the registration will continue in force for the remainder of the ten-year period, calculated from the registration date, unless cancelled by an order of the Commissioner for Trademarks or a federal court.

Second Filing Deadline: You must file a Declaration of Use (or Excusable Nonuse) and an Application for Renewal between the 9th and 10th years after the registration date.\*

See 15 U.S.C. §1059.

Requirements in Successive Ten-Year Periods\* What and When to File:

You must file a Declaration of Use (or Excusable Nonuse) and an Application for Renewal between every 9th and 10th-year period, calculated from the registration date.\*

#### Grace Period Filings\*

The above documents will be accepted as timely if filed within six months after the deadlines listed above with the payment of an additional fee.

The United States Patent and Trademark Office (USPTO) will NOT send you any future notice or reminder of these filing requirements.

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NOTE: Fees and requirements for maintaining registrations are subject to change. Please check the USPTO website for further information. With the exception of renewal applications for registered extensions of protection, you can file the registration maintenance documents referenced above online at http://www.uspto.gov.



31 Purchase Street, Ste. 3-4 Rye, New York 10580 914.967.9421 www.keegandonato.com

# Study of Secondary Meaning and Consumer Perceptions of Paint Nite

Keegan & Donato Consulting, LLC May 18, 2015



31 Purchase Street, Ste. 3-4 Rye, New York 10580 914.967.9421 www.keegandonato.com

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#### **Exhibits**

Exhibit 1—About Keegan & Donato Consulting, LLC

Exhibit 2—Questionnaire

Exhibit 3—Tabulated Data

Exhibit 4—Disposition of Contacts



# **Summary of Findings & Conclusions**

- Among consumers who associate the name Paint Nite with a company or companies, 57
  percent associate Paint Nite with one company.
- 2. Among all secondary meaning respondents, 35 percent associate the name Paint Nite with one company, representing the largest measurement across all answer categories.
- Paint Nite was the most recognized social painting brand among respondents. When asked to
  identify the social painting brands with which they are aware, 50 percent of respondents
  indicated an awareness of Paint Nite.
- 4. Paint Nite exhibited more than double the awareness among consumers than the next most recognized social painting brand (50 percent vs. 23 percent).
- 5. Paint Nite was the most-cited social painting brand among respondents. When asked to recall social painting companies by memory using their own words and without prompting (unaided recall), 43 percent of respondents who offered at least one response mentioned Paint Nite.
- 6. Paint Nite was cited more than four times as often through unaided recall by respondents as the next most cited social painting brand (43 percent vs. 9 percent).
- 7. These results show that Paint Nite has acquired significant secondary meaning and a high level of consumer awareness among the relevant market of social painting consumers.

# **Summary of Assignment**

- 8. Keegan & Donato Consulting, LLC ("Keegan & Donato") was engaged by counsel for Paint Nite to determine the extent to which, if at all, the Paint Nite mark has developed secondary meaning among relevant consumers.
- 9. Keegan & Donato was also asked to assess consumer awareness of the Paint Nite brand.
- 10. To this end, Keegan & Donato designed and executed a survey of consumers within the social painting market, i.e., the market in which Paint Nite and its competitors operate. The survey was designed and executed in accordance with accepted practices of survey research.
- 11. The methodology, results, and conclusions of the consumer study conducted by Keegan & Donato in this matter are discussed in detail in the sections that follow.

## Firm Overview

- 12. Keegan & Donato Consulting is a consulting firm serving litigators and their clients. Our areas of expertise include intellectual property, consumer survey research, damages analysis, forensic economic analysis, marketing, and related disciplines. Our firm designs and executes methodologically sound consumer survey research studies and objective evaluation of existing survey research as well as collaborates on a wide range complex commercial litigation issues.
- 13. The principals of Keegan & Donato Consulting are Mark Keegan and Anthony Donato. Mr. Keegan and Mr. Donato have over two decades of combined experience conducting consumer research studies in the context of litigation. Together they have designed, executed, and critiqued hundreds of surveys that have been admitted into evidence in federal and state courts, at arbitration, and to the TTAB (see Exhibit 1 for a partial list). Mr. Keegan & Mr. Donato have also collaborated extensively on cases involving economic, business, and financial issues. Both Mr. Keegan and Mr. Donato have testified and been accepted as experts for litigation.
- 14. Keegan & Donato Consulting is a member of ESOMAR, the leading global association for market, social, and opinion research, as well as the International Trademark Association (INTA). Mr. Keegan and Mr. Donato recently addressed a meeting of the Pennsylvania Bar Association's Intellectual Property Law group with a presentation on the building blocks of

survey research for litigation, consumer research best practices, and current trends in the industry. Additional information about Mr. Keegan and Mr. Donato is provided at Exhibit 1 to this report.

# Methodology

### Study Integrity

- 15. The survey conducted in this case was designed and executed in accordance with accepted standards of survey research. For example, this survey follows the guiding principles for survey research for the purpose of litigation, as outlined by Shari Diamond, including but not limited to:
  - Appropriate universe selection and sampling frame;
  - Rigorous and valid survey design that is probative of the relevant issues in the case;
  - Inclusion of representative, qualified respondents;
  - Use of procedures to minimize potential biases in data collection;
  - Use of objective, non-leading questions;
  - Use of procedures to reduce guessing among respondents; and
  - Full analysis and reporting of survey data.
- 16. The research was also guided by the provisions of the Lanham Act<sup>2</sup> and recognized treatises in the area of trademark research.<sup>3</sup>

### **Study Objectives**

17. Paint Nite is a participant in the social painting market. Social painting events are hosted at local bars and restaurants where attendees gather to enjoy cocktails and take a painting class.<sup>4</sup>

<sup>&</sup>lt;sup>1</sup> Diamond, S. (2011). "Reference Guide On Survey Research," in *Reference Manual on Scientific Evidence*. Federal Judicial Center/National Academy of Sciences, p. 359-423.

<sup>&</sup>lt;sup>2</sup> 15 USC §1125.

<sup>&</sup>lt;sup>3</sup> See, for example, McCarthy, T.J. (2003). McCarthy on Trademarks and Unfair Competition, 4<sup>th</sup> Ed.; Jacoby, J. (2013). Trademark Surveys, Volume 1: Designing, Implementing, and Evaluating Surveys.

- 18. The first objective of this study was to determine the extent to which, if at all, Paint Nite has developed secondary meaning in the phrase "Paint Nite" among a representative sample of consumers in the social painting market. Secondary meaning is a measurement of the degree to which qualified respondents perceive a mark to emanate from a single source or rather from multiple sources.
- 19. An additional objective of this study was to measure consumer awareness of the Paint Nite brand. Consumer awareness refers to the share of mind that a brand—in this case, Paint Nite—occupies among consumers in the relevant market. In other words, consumer awareness is a measure of how familiar consumers are with a brand relative to other competing brands in the marketplace.

#### Study Design

- 20. This study tested for secondary meaning and consumer awareness both in within the following six major metropolitan markets: Boston, Baltimore, Hartford, Orlando, Salt Lake City, and Madison. Because these markets represent diverse U.S. markets as well as markets in which Paint Nite operates, the study is both nationally representative as well as representative of Paint Nite's market area.
- 21. The study design consists of two separate modules: a secondary meaning module and a consumer awareness module. Qualified respondents were randomly assigned to either the secondary meaning <u>OR</u> the consumer awareness module (not both). This method was employed to prevent respondent conditioning and/or biased responses (e.g., through repeated exposure to the Paint Nite mark between the modules).
- 22. The secondary meaning module follows a standard design wherein respondents are asked whether, in the context of social painting, they associate the name Paint Nite with one company or more than one company. An open-ended follow up question—"Why do you say that?"—gave respondents the opportunity to explain the reasoning behind their selected answer.

<sup>&</sup>lt;sup>4</sup> This survey focuses on Paint Nite's notoriety in connection with social painting. However, we are aware that Paint Nite's services extend beyond social painting events hosted at local bars and restaurants in the evening. For example, Paint Nite has promoted and offered services to corporate clients interested in providing team building social events at conferences, meetings and corporate retreats during the day.

23. The consumer awareness module uses a two-pronged approach to gauge respondents' awareness of the Paint Nite brand. First, respondents are presented with an unaided recall question wherein they are asked to think of and record all of the social painting brands they can recall. Following this exercise, respondents are then presented with a list of social painting brands (including Paint Nite) and are asked to select all brands with which they are familiar.

#### **Data Collection Method**

- 24. This survey was completed through online interviewing via the Internet. The respondent sample was obtained through random selection among national consumer panel providers that maintain online consumer panels balanced to the United States Census.
- 25. The survey was programmed using an industry-leading online survey software platform. All survey programming was performed by Keegan & Donato Consulting. The survey software facilitates the programming and execution of advanced survey designs, including complex skip logic and advanced rotation and randomization of questions, answer options, and stimuli. All such options were employed wherever appropriate.
- 26. All efforts were made to ensure appropriate survey administration. The survey used "double blind" surveying procedures, i.e., neither the consumer panel provider nor the respondents knew the purpose of the survey or the sponsoring party.
- 27. Data collection for this study took place between April 13 and May 1, 2015.

### Sampling Plan

- 28. Surveys are conducted by collecting data from a sample, or subset, of the population of interest, i.e., the larger group to which the study results may be projected. The sampling plan for this study was designed to accurately represent consumers within the social painting market.
- 29. Surveys typically, and in this case, are designed such that the results are reliable at the 95 percent confidence level. A total of 404 respondents—202 in the secondary meaning module and 202 in the consumer awareness module—qualified for and completed the questionnaire (see full disposition of contacts at Exhibit 4). Samples of approximately 200 respondents are associated, on the average, with a margin of error of ±6.9 percentage points at 95 percent confidence. Thus, if the study were replicated an infinite number of times, one would expect

the observed results to be bracketed within the specified margin of error in 95 percent of the cases.

## **Population**

- 30. To generate reliable results it is necessary to sample from the population that most closely resembles the target market—i.e., those consumers who would likely have exposure to the product or service of interest in the marketplace.
- 31. In this case, the population most likely to have exposure to and familiarity with the Paint Nite brand are those who have participated in or anticipate participating in a social painting event.

  Therefore, for the purpose of this survey, a qualified respondent is defined as someone who:
  - Has participated in a social painting event in the past six months or anticipates doing so in the next six months;
  - Resides in a major metropolitan market where social painting events take place.
- 32. Additionally, because social painting events primarily attract female customers who are of legal drinking age and typically take place at bars and restaurants that serve alcohol, we required all respondents to be females who are at least 21 years of age.
- 33. Any potential respondents who did not meet the requirements defined above were excluded from participation in the survey. Quotas were used to ensure the sample would be both nationally representative and representative of those metropolitan markets in which Paint Nite operates.

#### Questionnaire

34. In consumer surveys, data are collected by means of a questionnaire. In this case, the questionnaire was divided into four parts: a screener portion, the secondary meaning module, the consumer awareness module, and the opinion/demographics section. Each part of the questionnaire will be addressed in the sections below. The full questionnaire is available as Exhibit 2.

#### Screener

35. The screener portion of the questionnaire opens with a series of general instructions.
Importantly, respondents are instructed to select the "don't know" answer option for any

question they are unsure how to answer. The role of this procedure is to remove any perceived psychological pressure on consumers taking the survey and to reduce guessing. This step encourages respondents to express their true feelings and opinions. Only respondents who indicated that they understood the instructions were allowed to continue with the survey.

36. Respondents were next asked to indicate their gender. As described above, because social painting events typically attract female customers, only females were allowed to continue with the survey:

What is your gender?

- Male
- Female
- 37. Because social painting events are typically held at bars and restaurants that serve alcohol, the next screener question was intended to identify and terminate potential participants under 21 years of age:

Which of the following age brackets contains your age on your last birthday?

- Under 21
- 21-30
- 31-40
- 41-50
- 51-60
- 61-70
- 71 or older
- 38. Respondents were next asked to identify the state and county in which they live. This information was used to identify respondents who primarily reside within the metropolitan markets being targeted in this study:

In which state do you primarily reside? [drop down list]
In which [MA/MD/CT/FL/UT/WI] county do you primarily reside?

- 39. Only respondents who indicated that they live in the Boston, Baltimore, Hartford, Orlando, Salt Lake City, or Madison metropolitan regions<sup>5</sup> were permitted to continue with the survey.
- 40. The next questions identified respondents who have participated or anticipate participating in a social painting event. Because this survey concerns brands that operate in the social painting market, only respondents who are customers or potential customers in this market were allowed to continue with the survey. Respondents were first asked:

In which of the following types of activities, if any, have you participated in the past six months? Please select all that apply.

- Social painting event
- Book club meeting
- PTA meeting
- Product demonstration event
- Yoga class
- Class reunion / alumni event
- Job fair / networking event
- None of the above
- 41. The answer options in the list above were presented in randomized order to eliminate any opportunity for position bias. Respondents who selected "social painting event" from the list were deemed qualified to participate in the remainder of the survey. The other answer options in the list above were included as masking items to conceal the purpose of the survey from respondents. Selecting any of these answer options had no bearing on whether the respondent qualified for the survey.
- 42. Respondents who did not select "social painting event" in the previous question were asked a follow-up question to determine whether they are a potential participant in the social painting market:

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<sup>&</sup>lt;sup>5</sup> For the purpose of this study, residency was defined using the Metropolitan Statistical Area counties for each region.

In which of the following types of activities, if any, do you expect to participate in the next six months? Please select all that apply.

- Social painting event
- Book club meeting
- PTA meeting
- Product demonstration event
- Yoga class
- Class reunion / alumni event
- Job fair / networking event
- None of the above
- 43. Respondents who selected "social painting event" in the follow-up question were qualified to continue in the survey. All other respondents terminated, as they did not meet the qualification criteria—i.e., they did not participate or anticipate participating in the social painting market.
- 44. The questions above constitute the screener portion of the questionnaire. Respondents who qualified based on these questions were permitted to participate in the main portion of the survey, wherein they were randomly assigned either to the secondary meaning module or the consumer awareness module.

### Secondary Meaning Module

45. Half of the respondents who passed the screener portion of the questionnaire were randomly assigned to the secondary meaning module. The secondary meaning module was designed to determine the extent to which relevant consumers associate the mark Paint Nite with a single source.

46. The secondary meaning module began by exposing respondents to a brief introductory statement which placed them in the context of the social painting market. It is typical and appropriate to place respondents in the proper state of mind before answering the key question(s) of interest in a study, as it is the researcher's job to replicate marketplace conditions as closely as possible in the survey environment. In this case, respondents were instructed:

The next part of the survey is about social painting. Social painting events are hosted at local bars and restaurants where attendees gather to enjoy cocktails and take a painting class.

On the next page, you will be shown a phrase. Please take as much time to look at the phrase as you would if you saw it being used in connection with a social painting event. You will be asked your opinions regarding the phrase when you are finished viewing it.

47. Respondents were next shown the following instruction and a block letter (i.e., unstylized) presentation of the Paint Nite mark. It is common when testing for secondary meaning to present the unstylized mark, because a stylized mark (e.g., a logo) can imply a single source, thereby potentially biasing responses. In this case, respondents were asked:

Please consider the phrase below as you would if you saw it being used in connection with a social painting event.

Please click the "Next" button at the bottom of the page when you are ready to continue.

# PAINT NITE

48. Upon advancing, the Paint Nite mark was removed from sight and respondents were presented with the primary secondary meaning measure:

With regard to social painting, do you associate the phrase you just considered with one company, more than one company, no company at all, or you don't know?

- One company
- More than one company
- No company at all
- Don't know / no opinion
- 49. Respondents were then given an opportunity to explain their response through an open-ended (i.e., text box) question:

In the last question, you stated that with regard to social painting, you associate the phrase **PAINT NITE** with [one company/more than one company/no company at all]. Why do you say that? Please list everything that comes to mind.

50. Together, the previous two questions comprise the secondary meaning module of the questionnaire. Respondents next advanced to the opinion/demographics section of the questionnaire.

#### Consumer Awareness Module

- 51. As described above, half of respondents who passed the screener portion of the questionnaire were randomly assigned to the consumer awareness module. The consumer awareness module was designed to gauge the extent to which Paint Nite has garnered recognition and mindshare among consumers in the social painting market.
- 52. The consumer awareness module began with an open-ended question. Open-ended questions are questions wherein the respondent is required to type in an answer using his/her own words. Open-ended questions are used by researchers to test "unaided awareness" of a phenomenon among a group of respondents, as they provide no prompting or other form of assistance to the respondent. Because respondents cannot rely on context cues in the question itself (e.g., through multiple choice answer options), open-ended questions provide a rigorous measure of consumer opinion and awareness.
- 53. In this study, respondents assigned to the consumer awareness module were presented with the following open-ended question:
  - In the spaces provided below, please list all of the social painting event brands that you are aware of. Please list everything that comes to mind. If you cannot recall any social painting event brands, please click the "Next" button below to advance to the next question.
- 54. Respondents were provided the opportunity to enter as many social painting brands as they could recall from memory.
- 55. After completing the open-ended question, respondents were presented with a closed-ended question to measure consumer awareness of the Paint Nite brand. Also referred to as "aided awareness" questions, closed-ended questions provide respondents with various answer options to consider when formulating a response. The multiple choice question is an example

of a closed-ended question format. Closed-ended questions are commonly used by researchers and are considered a valid means of probing consumer opinion and awareness.

56. In this study, consumers were presented with the following closed-ended question to measure their awareness of the Paint Nite brand:

Which of the following social painting event brands, if any, are you aware of?

- PAINT NITE - VINO VAN GOGH
- PAINT BAR - THE PAINT MIXER
- PAINTING WITH A TWIST - YES YOU CANVAS!
- PINOT'S PALETTE - DRINKABLE ARTS
- WINE & CANVAS - PAINT SOCIAL ART
- PUB AND PAINT - COLORS AND BOTTLES

- BOTTLE & BOTTEGA - None of the above

- 57. The list of answer options presented in the question above includes all major competitors in the social painting market. The answer options were presented to respondents in randomized order to eliminate the opportunity for position bias.
- 58. The open-ended and closed-ended questions described herein comprise the consumer awareness module of the questionnaire. Respondents next advanced to the opinion/demographics section of the questionnaire.

#### Opinion/Demographics

- 59. Following the trademark survey modules, an opinion and demographic section of the questionnaire addressed several additional questions of interest to Paint Nite (opinion questions) and collected standard demographic information collected by survey researchers (demographic questions).
- 60. The opinion questions included the following:

How is Paint Nite different from other social painting events that you know about? How did you first become aware of social painting events?

When you attended a social painting event, with whom did you attend? (Or, if you plan to attend a social painting event, with whom will you attend?)

61. These questions do not address any relevant trademark issues; therefore the results of these questions will not be discussed in this report. Because the opinion questions were posed to

consumers in sequence after the relevant trademark questions, these questions posed no risk of biasing consumer responses on the relevant trademark issues in any way.

62. The demographic questions collected information about education and household income, as is standard in consumer research of this type.

# **Results & Analysis**

- 63. This study found significant secondary meaning among consumers who associate the name Paint Nite with a company or companies, with 57 percent of such respondents associating Paint Nite with one company.
- 64. Additionally, this study showed high levels of consumer awareness of the Paint Nite brand, with consumers exhibiting more than double the awareness of Paint Nite as compared to the next most recognized social painting brand (50 percent Paint Nite vs. 23 percent Wine and Canvas).

### **Secondary Meaning**

- 65. The results from the secondary meaning portion of this study support a finding of strong secondary meaning in the Paint Nite mark.<sup>6</sup>
- 66. Among those with awareness of the Paint Nite brand—i.e., respondents who associate Paint Nite with a company or companies—there is strong single source attribution for Paint Nite. As shown in Table 1, among consumers who associate the name Paint Nite with a company or companies, 57 percent associate Paint Nite with one company.

<sup>6</sup> There were no meaningful differences in the secondary meaning findings across the metropolitan markets targeted in this study.

Table 1. Secondary meaning findings, sub-group

	"Paint Nite"
(Base: Secondary meaning module respondents who associate Paint Nite with a company or companies)	(n=122) %
One company	57
More than one company	43

67. A high level of secondary meaning is also observed across all secondary meaning module respondents. As shown in Table 2, 35 percent of secondary meaning module respondents (n=202) indicated that they associate the mark "Paint Nite" with one company. Attributing Paint Nite to a single source was the most frequently chosen response among consumers in the social painting market. This is a considerable accomplishment for Paint Nite considering its short history of operations.<sup>7</sup>

Table 2. Secondary meaning findings, whole sample

	"Paint Nite"
(Base: Secondary meaning module respondents)	(n=202) %
One company	35
More than one company	26
No company at all	32
Don't know / No opinion	8

68. The open-ended responses offered by respondents as to why they associate Paint Nite with one company provide insight into the market recognition that Paint Nite has built since it began operations. As shown in Table 3, there is very specific recognition of Paint Nite as a single company among many respondents.

<sup>&</sup>lt;sup>7</sup> Paint Nite began operating in the Boston metropolitan market in March 2012 and has expanded its operations to over 135 U.S. and international markets since that time.

Table 3. Select open-ended responses, "One Company"

Response ID	Source Attribution	"Why do you say that?" (verbatim)
R_cl2mvfYOum6aoWp	One company	I know there is a company called Paint Nite. I know there are other companies that put on "Paint and Wine" nights, but Paint Nite is a specific company
R_9mHMVLXSyqDwFZX	One company	In CT there is an actual company called Paint Nitethere are other painting companies but Paint Nite has brand recognition with me.
R_42ZJqzzThaRYclv	One company	When signing up for paint nite, the website appeared as one company that was present in multiple cities and multiple different locations.
R_9nsE26K9O9MZJ6R	One company	I am familiar with a local company that uses this name. Also, the spelling of nite indicates it's the name of a company, not a general name.
R_4Vds1YHikR7Nq6N	One company	l only know of one social painting company around this area.
R_6XxUhMQpPmrINVX	One company	Because I feel one company would use that phrase, to stand out from others, so people would know, which company is holding the event.
R_ahmVXz4ISGuiEM5	One company	Paint Nite, paint socially. I can imagine their logo. It's black with "Paint Nite" and pops of color
R_bj5E5FsAEKrw4q9	One company	One company hosting an event called Paint Nite.
R_e4Hn1je8AYmps7r	One company	I've seen the company Paint Nite advertised. I have seen their Facebook page
R_39PUeMJICjlajad	One company	I have only done these events with Paint Nite
R_6JMadLbhEmhCyhf	One company	That is what the class was called that I participated in, I thought that's what they called themselves

69. The verbatim responses provided by participants show that Paint Nite has built strong single source attribution among relevant consumers in the social painting market. These responses show a high and detailed level of recall about the brand among consumers as a distinctive, single source of social painting services. The strong single source attribution of Paint Nite

exhibited by consumers is reflective of the company's seniority in this relatively young market.

70. Thus, as shown in the results above, Paint Nite has built significant secondary meaning among relevant consumers in the social painting market.

#### **Consumer Awareness**

71. The results of the Consumer Awareness portion of this study show a significant level of awareness of the Paint Nite brand among consumers in the social painting market. As shown in Table 4 below, when consumers were asked to recall from their own memory all of the social painting brands with which they were familiar, Paint Nite was by far the most cited brand.

Table 4. Consumer awareness of social painting brands, unaided recall

(Base: Consumer awareness module respondents who recalled at least one social painting brand)	(122) %
Paint Nite	43
Muse Paint Bar	9
Painting With A Twist	4
Upaint	4
Paint Bar	3
Paint Mixer	2
Social Artworking	2
Pinot's Palette	2

- 72. As shown above, 43 percent of those respondents who could recall at least one social painting brand cited Paint Nite. At this level of recall, unaided consumer awareness of Paint Nite is over four times that of the next most cited social painting brand—i.e., Muse Paint Bar at 9 percent.
- 73. The fact that nearly half of respondents who could recall at least one social painting brand from memory cited Paint Nite provides empirical evidence that Paint Nite has captured significant mindshare among consumers in the social painting market. The fact that other competitors in the social painting market were cited so infrequently by respondents (as

compared to Paint Nite) cements Paint Nite's position as the dominant participant in the market.

74. Respondents were next asked a closed-ended, aided recall question to determine their awareness of social painting brands. As shown in Table 5, when asked to select from a list of social painting brands those brands with which they are familiar, Paint Nite again emerged as the most well-known brand among consumers.

Table 5. Consumer awareness of social painting brands, aided recall

(Base: Consumer awareness module respondents)	(202) %
Paint Nite	50
Wine & Canvas	23
Paint Bar	22
Painting With A Twist	17
Pub And Paint	15
Paint Social Art	13
The Paint Mixer	12
Yes You Canvas!	10
Colors And Bottles	10
Pinot's Palette	9
Vino Van Gogh	7
Drinkable Arts	6
Bottle & Bottega	4
None of the above	14

75. As shown above, consumer awareness of Paint Nite is widespread, with one in two consumers (50 percent) in the social painting market indicating awareness of the Paint Nite brand. Compared to other brands in the social painting market, consumer awareness of Paint Nite is more than double that of the next most recognized brand (50 percent vs. 23 percent). This data again confirms that Paint Nite is the dominant market leader with broad consumer awareness in the social painting market.

# Conclusions

76. The findings of the study described herein provide empirical evidence that:

- Among consumers who associate the name Paint Nite with a company or companies, 57
  percent associate Paint Nite with one company.
- Among all secondary meaning respondents, 35 percent associate the name Paint Nite with one company, representing the largest measurement across all answer categories.
- Paint Nite was the most recognized social painting brand among respondents. When
  asked to identify the social painting brands with which they are aware, 50 percent of
  respondents indicated an awareness of Paint Nite.
- Paint Nite exhibited more than double the awareness among consumers than the next most recognized social painting brand (50 percent vs. 23 percent).
- Paint Nite was the most-cited social painting brand among respondents. When asked to
  recall social painting companies by memory using their own words and without
  prompting (unaided recall), 43 percent of respondents who offered at least one response
  mentioned Paint Nite.
- Paint Nite was cited more than four times as often through unaided recall by respondents as the next most cited social painting brand (43 percent vs. 9 percent).
- 77. These results show that Paint Nite has acquired substantial secondary meaning among consumers in the social painting market and that relevant consumers exhibit high levels of awareness of the Paint Nite brand.
- 78. Accordingly, one can conclude that Paint Nite is a leading brand in the social painting market with a high level of perceived distinctiveness and single source attribution among consumers.

Keegan & Donato Consulting, LLC reserves the right to supplement and revise this report and the opinions expressed herein based on the availability of new information.

For Keegan & Donato Consulting, LLC:

Mark Regna May 18, 2015

Mark Keegan Date

# Exhibit 1—About Keegan & Donato Consulting, LLC



# Mark T. Keegan, Esq.

Partner, Keegan & Donato Consulting, LLC

#### Education

- Juris Doctor, Brooklyn Law School (1995)
- Bachelor of Arts, History, Pace University (1990)
- MBA Coursework, Pace University, Lubin School of Business (1990 1991)

### **Certifications & Professional Memberships**

- Admitted to the Bar in the states of New York and Connecticut
- Registered Representative, National Association of Securities Dealers (Series 7, expired)
- Member, ESOMAR (World Association of Opinion and Marketing Research Professionals)
- Member, INTA (International Trademark Association)

# **Current Employment**

- Keegan & Donato Consulting, LLC, Litigation Consultant, Partner (7/2011 present)
- Keegan & Company LLC, Senior Associate (9/2001 present)

### **Professional Experience**

- Litigation consulting and testifying expert for corporate clients across a broad range
  of industries for cases in state and federal courts and before administrative agencies.
- Develop case strategy and expert testimony in the areas of economic analysis, marketing, consumer behavior, intellectual property, and other business-related fields for complex civil litigation.

# Economic & Damages Analysis

 Quantify damages through development of economic estimation models using industry-accepted methodologies.

- Analyze key internal financial documents and other case documents to reach conclusions regarding event impact.
- Areas of analysis include reasonable royalty, lost profits (income, market, and cost approaches), unjust enrichment, and other damages approaches.
- Principal contributor to a wide range of damages models prepared for presentation in state and federal court.

#### Consumer Research

- Develop and execute consumer research studies using industry-accepted methodologies.
- Analyze and interpret primary survey data to develop case-specific conclusions.
- Areas of study include consumer confusion, trade dress, dilution, consumer behavior, secondary meaning, genericness, and other consumer research issues.
- Principal contributor to many surveys designed and executed for presentation in state and federal court and in front of the Trademark Trial and Appeal Board.

### Marketing Analysis

- Analyze and evaluate comprehensive marketing campaigns to determine their impact on consumers.
- Evaluate all components of integrated marketing communications including advertising, public relations, packaging, sales promotions, and point of sale materials, among others.
- Develop testimony on marketing messages and their intended influence on consumer understanding and behavior.

### **Previous Employment**

- Information Markets Corp, Program Manager (2000 2001)
  - Managed enterprise-wide marketing and product development. Developed use cases and conducted consumer market research. Coordinated with multiple partners including AOL, Excite, and NBC.
- Affiliation Networks, Inc., Project Manager (1999 2000)
  - Produced online advertising solutions for Fortune 500 clients. Coordinated creative team of account managers, designers, programmers and copywriters.

UpTick Technologies, Marketing Consultant (1999)

Managed the creation of innovative marketing products for large brokerage software provider.

Cosmos Internet Solutions, Marketing Consultant (1998 – 1999)

Developed marketing strategy for business ISP and hosting provider as well as Web site marketing and development for clients.

■ FactSet Research Systems, Product Development (1996 – 1998)

Formulated product and communications strategies for leading integrated financial and economic database provider.

Warren Keegan Associates, Inc., Marketing Consultant (1992 – 1996)

Marketing consultant to clients across a range of industries. Edited and contributed content to marketing textbooks and other academic marketing publications.

■ BMW of North America, Inc., Graduate Appointment (1991)

Reviewed, analyzed, and cataloged broad-based market research on consumer preferences and attitudes in the automobile industry.

## **Contact Information**

Keegan & Donato Consulting, LLC 31 Purchase Street, Ste. 3-4 Rye, NY 10580 (914) 967-9421 mark@keegandonato.com



# **Anthony N. Donato**

Partner, Keegan & Donato Consulting, LLC

#### Education

- Master of Public Policy, Georgetown University (2002)
- Bachelor of Arts, Politics, Ursinus College (2000)

### **Employment**

- Keegan & Donato Consulting, LLC, Litigation Consultant, Partner (7/2011 present)
- Keegan & Company LLC, Business Analyst (9/2004 present)
- Harvard Medical School, Division On Addictions, Researcher, (9/2002 6/2004)

### **Professional Experience**

- Provide litigation support to wide range of corporate clients on issues such as trademark, including trade dress, secondary meaning, and consumer confusion, copyright, marketing including advertising, damages, and other business related issues.
- Design and execute consumer research studies for consulting and litigation clients
- Principal contributor to many surveys designed and executed for presentation in state and federal court and in front of the Trademark Trial and Appeal Board (TTAB).
- Develop damages models including reasonable royalty, lost profits (income, market, and cost approaches), unjust enrichment, and other approaches.
- Develop economic analysis, marketing, consumer behavior, intellectual property, and other business-related models for consulting and litigation clients.
- Conduct comprehensive analyses of marketing campaigns to determine their impact on consumers.
- Integrated marketing communications analysis including advertising, public relations, packaging, sales promotions, and point of sale materials, among others.
- Develop testimony on marketing messages and their intended influence on consumer understanding and behavior.



## About Us



Mark Keegan brings a wide breadth of experience to Keegan & Donato Consulting, having spent over a decade formulating case strategies in complex litigation. As a founding partner of Keegan & Company, LLC, Mr. Keegan has actively consulted on a variety of litigation issues ranging from marketing and international business to consumer research for Lanham Act claims.

Prior to his work with Keegan & Company, Mr. Keegan assisted a diverse range of companies as a marketing strategist and operations manager. From working with top brands to create innovative online advertising solutions to positioning and communicating a company's competitive advantage, Mr. Keegan's practical execution of successful marketing strategies has benefited several organizations.

Mr. Keegan received his law degree from Brooklyn Law School (1995) and is licensed to practice in New York and Connecticut. His undergraduate work was completed at Pace University where he received a Bachelor of Arts in history.



Tony Donato has served as a consultant in complex litigation matters since 2004. He has a broad range of experience in research, strategy, survey design & execution, data analysis and case management. Mr. Donato has consulted on a wide variety of marketing, intellectual property, and consumer behavior cases covering trademark, copyright, patent, best efforts, advertising, business damages, consumer surveys, business ethics, and other issues.

Mr. Donato has a strong analytical background which he developed in his prior employment as a member of the research team at Harvard Medical School's Division on Addictions. He is the co-author of several peer-reviewed journal articles.

Mr. Donato received a Master of Public Policy from Georgetown University (2002) and a Bachelor of Arts in politics from Ursinus College (2000).



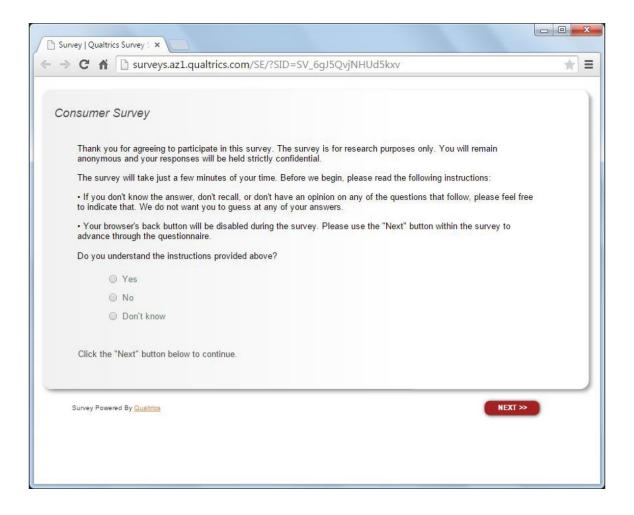
# **Testimonial Experience**

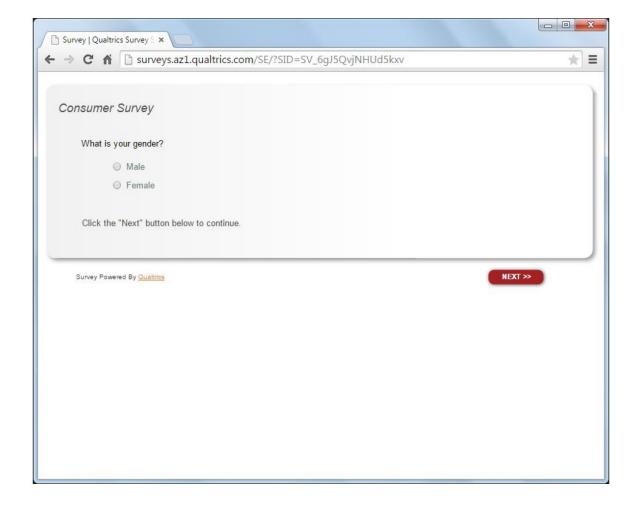
Case	Court	Witness	Туре
Joseph R. Tomelleri v. Zazzle Inc.	U.S. District Court, District of Kansas	Mr. Keegan	Deposition
American Energy Corporation v. American Energy Partners	U.S. District Court, Southern District of Ohio	Mr. Keegan	Deposition
Anton Maier & Roger Maier v. ASOS PLC & ASOS.com Limited	U.S. District Court, District of Maryland	Mr. Keegan	Deposition
Flushing Bank v. Green Dot Corporation and Green Dot Bank	U.S. District Court, Southern District of New York	Mr. Keegan	Deposition
Victorinox AG et al. v. The B&F System, Inc.	U.S. District Court Southern District of New York	Mr. Keegan	Deposition
Victorinox AG et al. v. The B&F System, Inc.	U.S. District Court Southern District of New York	Mr. Donato	Deposition
1-800-Contacts, Inc., v. Lens.com, Inc., et al.	U.S. District Court District of Utah Central Division	Mr. Keegan	Deposition
Coordination Proceeding Special Title [Rule 1550(B)] Sunscreen Cases	Superior Court of the State of California, County of Los Angeles	Mr. Keegan	Deposition

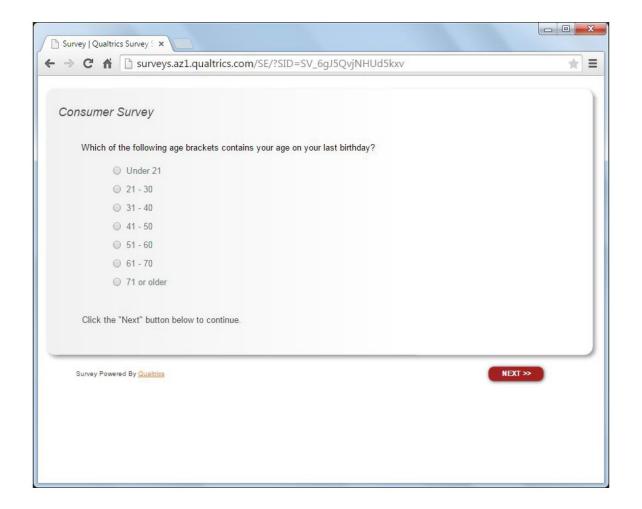
# **Lectures & Presentations**

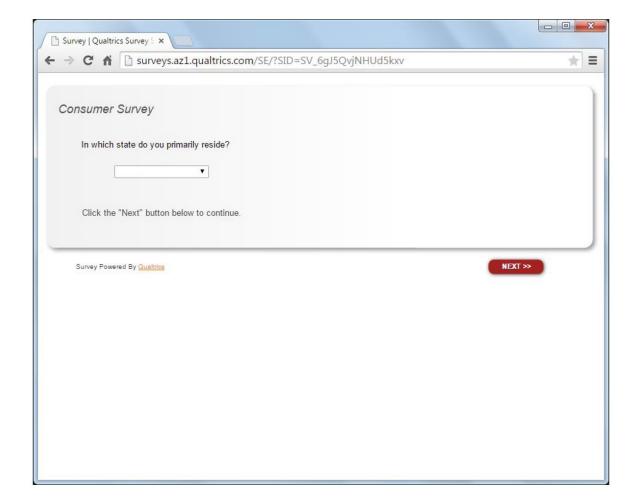
Consumer Survey Research for Litigation: With Great Data Comes Great Power. Presentation before the Pennsylvania Bar Association, Intellectual Property Law Group, 12/8/2014.

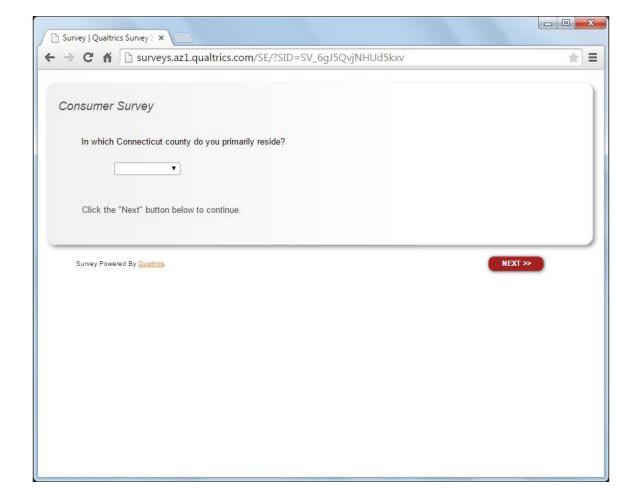
# Exhibit 2—Questionnaire

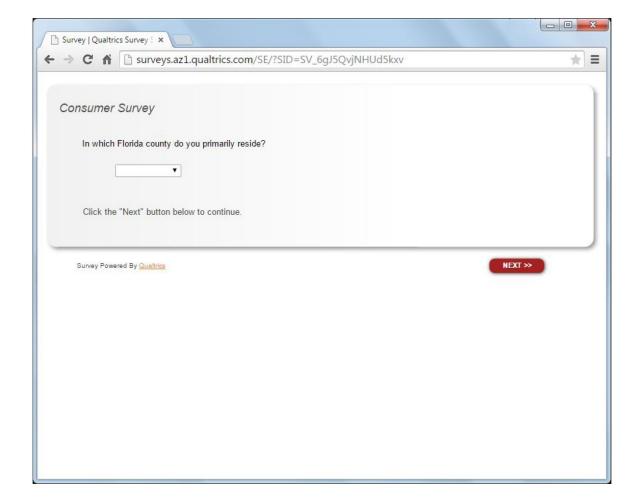


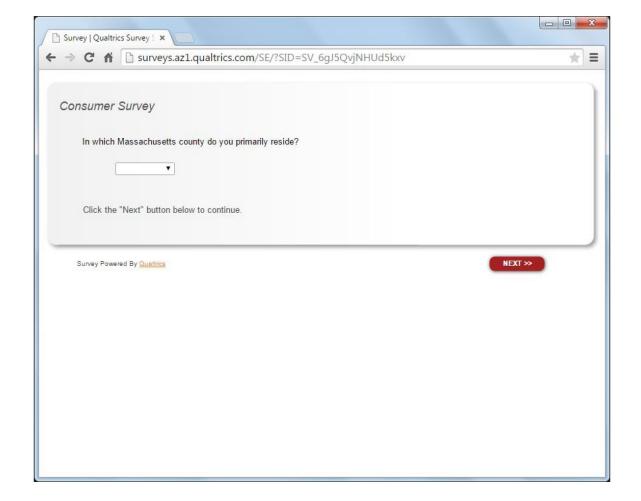


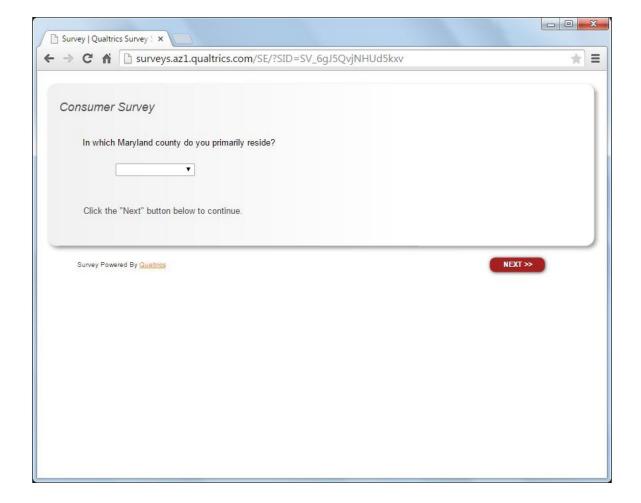


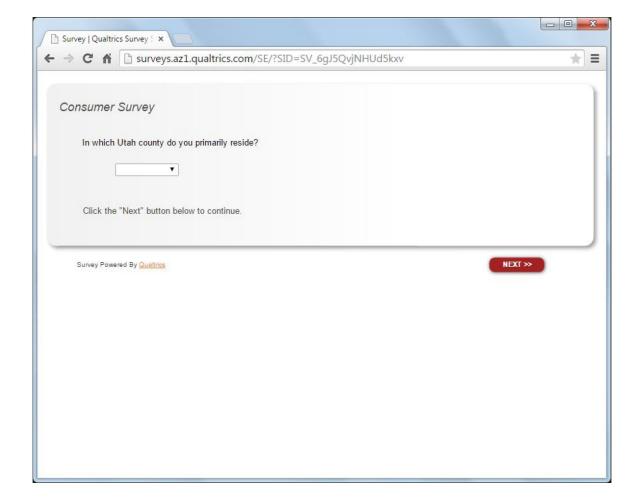


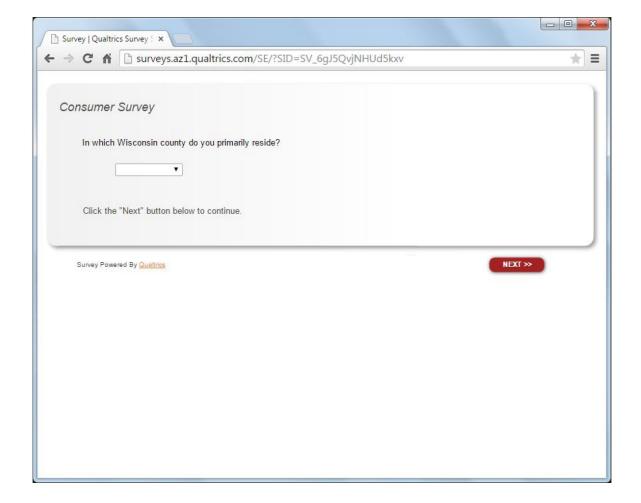


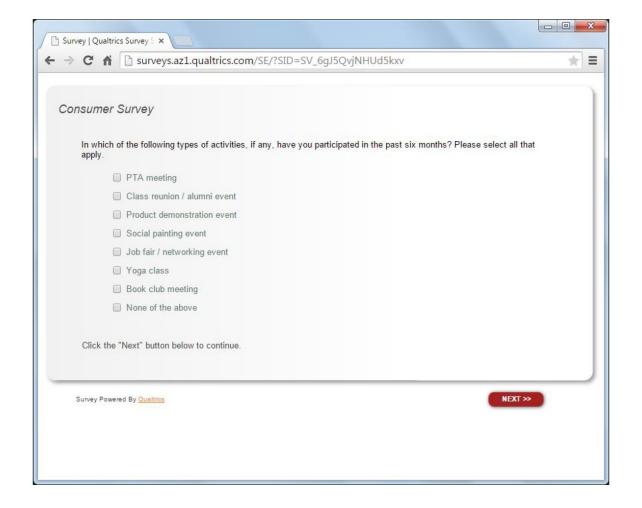


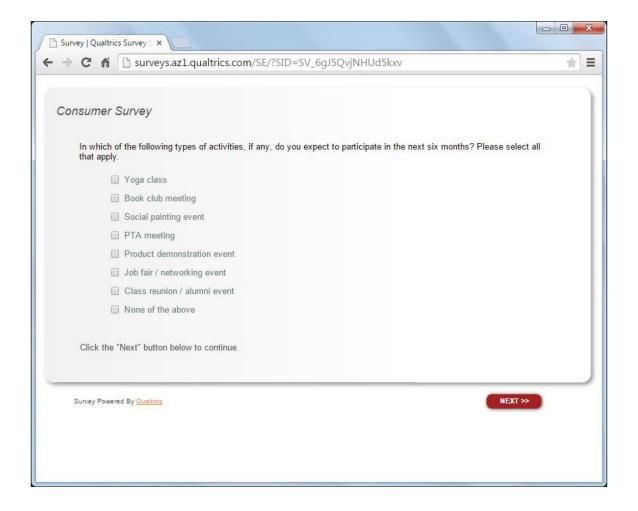


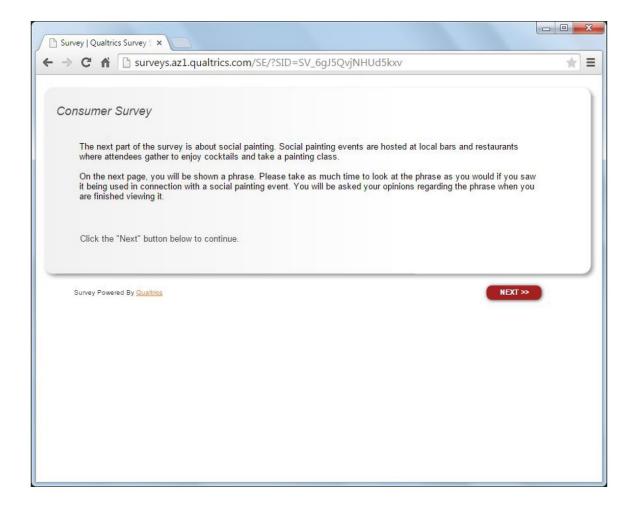


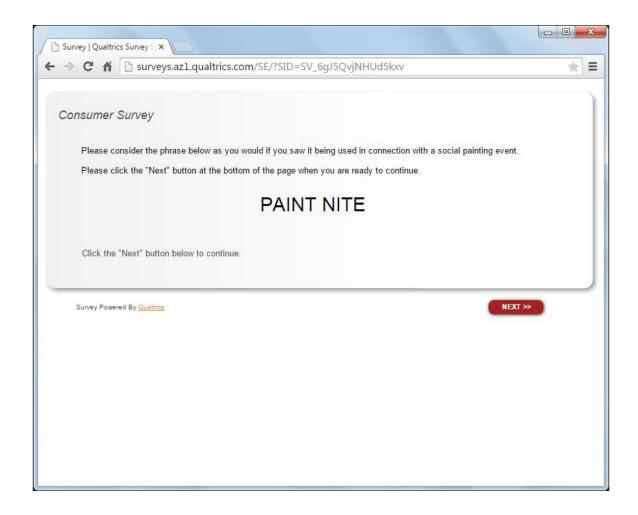


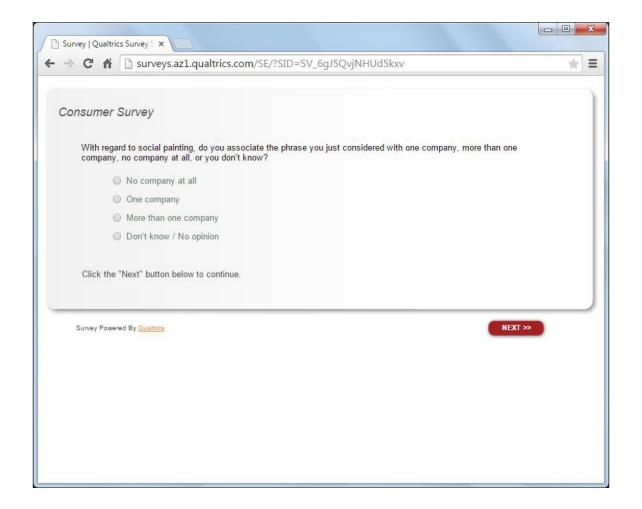


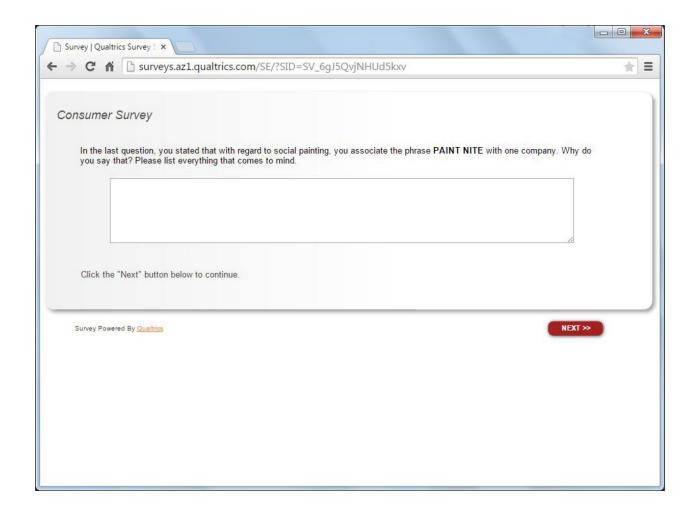


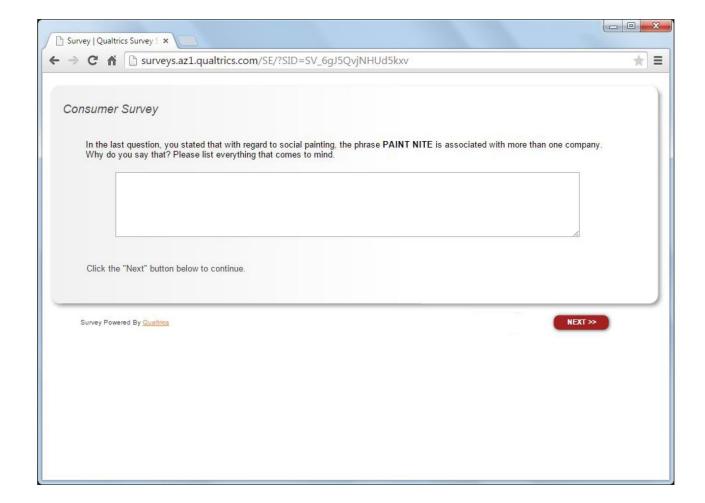


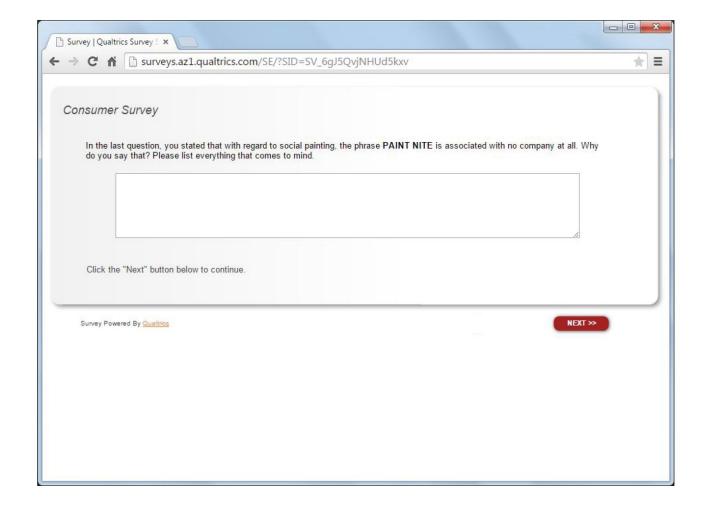


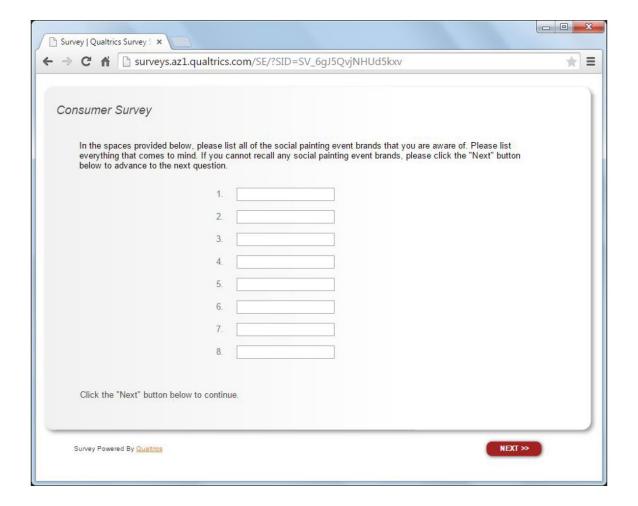


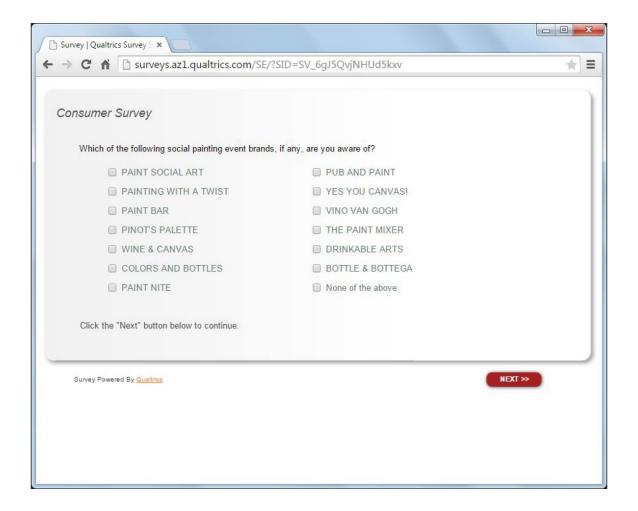


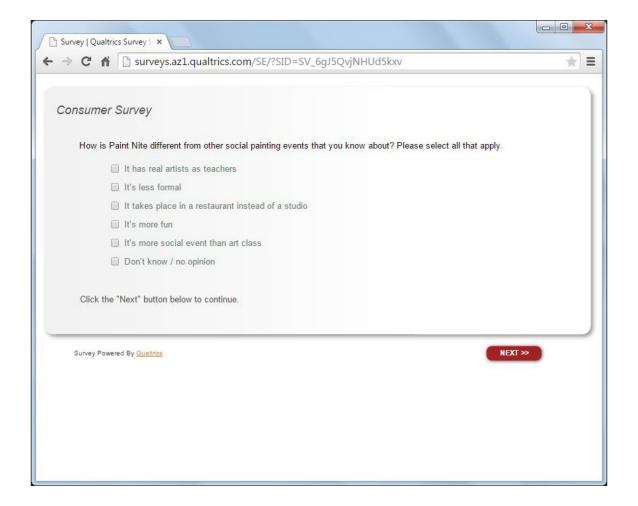


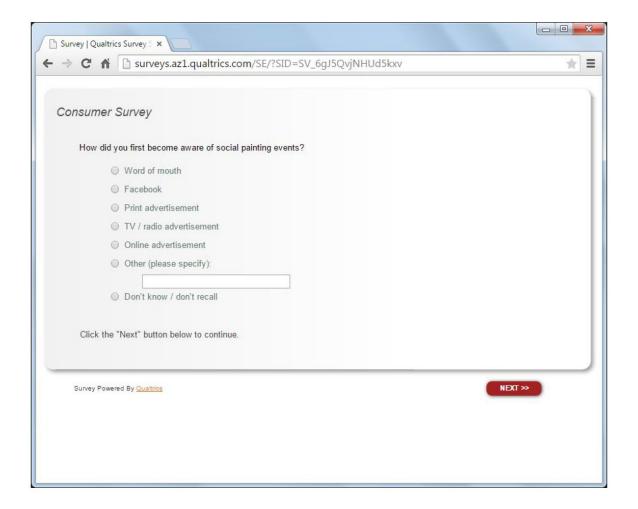


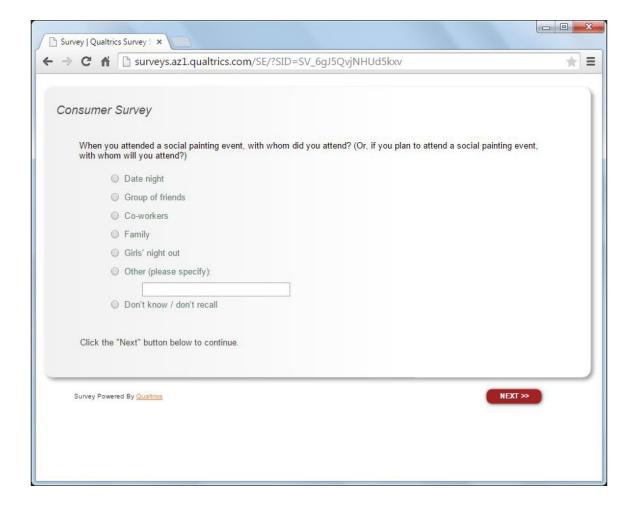


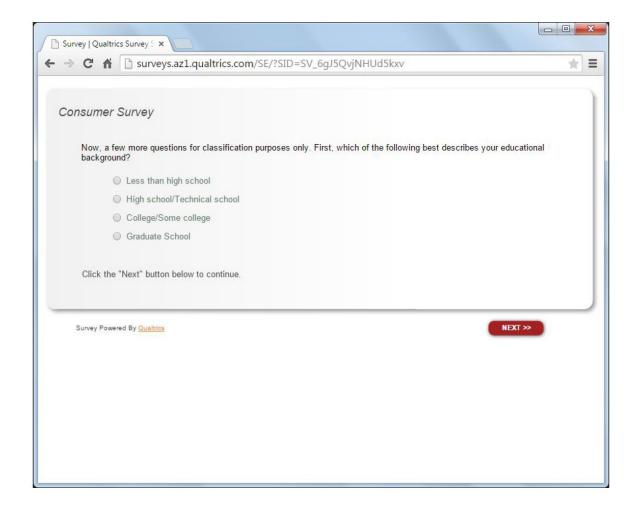


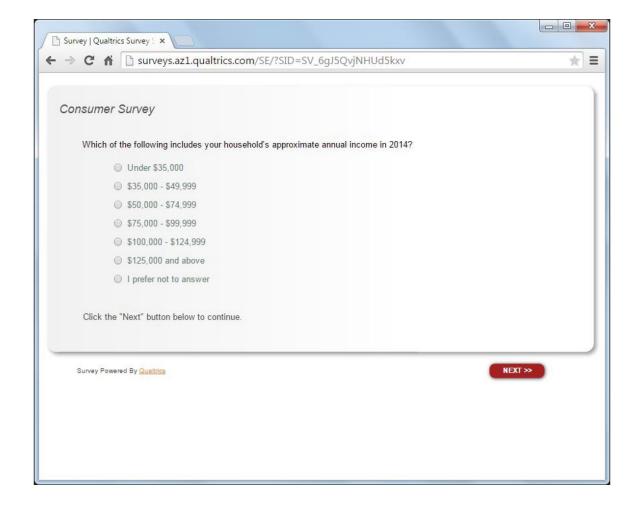












## **Exhibit 3—Tabulated Data**

### Paint Nite Study – Tabulated Results

1. Thank you for agreeing to participate in this survey. The survey is for research purposes only. You will remain anonymous and your responses will be held strictly confidential. The survey will take just a few minutes of your time. Before we begin, please read the following instructions: • If you don't know the answer, don't recall, or don't have an opinion on any of the questions that follow, please feel free to indicate that. We do not want you to guess at any of your answers. • Your browser's back button will be disabled during the survey. Please use the "Next" button within the survey to advance through the questionnaire. Do you understand the instructions provided above?

#	Answer	Response	%
1	Yes	404	100%
2	No	0	0%
3	Don't know	0	0%
	Total	404	100%

2. What is yo	our gender?		
#	Answer	Response	%
1	Male	0	0%
2	Female	404	100%
	Total	404	100%

3. Which of the following age brackets contains your age on your last birthday?				
#	Answer		Response	%
1	21 - 30		168	42%
2	31 - 40		126	31%
3	41 - 50		60	15%
4	51 - 60		32	8%
5	61 - 70		17	4%
6	71 or older		1	0%
8	Under 21		0	0%
	Total		404	100%

4. In which state do you primarily reside?				
#	Answer	Response	%	
1	Alabama	0	0%	
2	Alaska	0	0%	
3	Arizona	0	0%	
4	Arkansas	0	0%	
5	California	0	0%	
6	Colorado	0	0%	
7	Connecticut	68	17%	
8	Delaware	0	0%	
9	District of Columbia	0	0%	
10	Florida	68	17%	
11	Georgia	0	0%	
12	Hawaii	0	0%	
13	Idaho	0	0%	
14	Illinois	0	0%	
15	Indiana	0	0%	
16	Iowa	0	0%	
17	Kansas	0	0%	
18	Kentucky	0	0%	
19	Louisiana	0	0%	
20	Maine	0	0%	
21	Maryland	68	17%	
22	Massachusetts	68	17%	
23	Michigan	0	0%	
24	Minnesota	0	0%	
25	Mississippi	0	0%	
26	Missouri	0	0%	
27	Montana	0	0%	
28	Nebraska	0	0%	
29	Nevada	0	0%	
30	New Hampshire	0	0%	
31	New Jersey	0	0%	
32	New Mexico	0	0%	
33	New York	0	0%	
34	North Carolina	0	0%	

35	North Dakota	0	0%
36	Ohio	0	0%
37	Oklahoma	0	0%
38	Oregon	0	0%
39	Pennsylvania	0	0%
40	Rhode Island	0	0%
41	South Carolina	0	0%
42	South Dakota	0	0%
43	Tennessee	0	0%
44	Texas	0	0%
45	Utah	68	17%
46	Vermont	0	0%
47	Virginia	0	0%
48	Washington	0	0%
49	West Virginia	0	0%
50	Wisconsin	64	16%
51	Wyoming	0	0%
	Total	404	100%

5. In which Massachusetts county do you primarily reside?				
#	Answer		Response	%
5	Barnstable		0	0%
6	Berkshire		0	0%
7	Bristol		0	0%
8	Dukes		0	0%
9	Essex		20	29%
10	Franklin		0	0%
11	Hampden		0	0%
12	Hampshire		0	0%
13	Middlesex		17	25%
14	Nantucket		0	0%
15	Norfolk		11	16%
16	Plymouth		6	9%
17	Suffolk		14	21%
18	Worcester		0	0%
	Total		68	100%

6. In which Maryland county do you primarily reside?				
#	Answer		Response	%
5	Allegany		0	0%
6	Anne Arundel		15	22%
7	Baltimore City		13	19%
8	Baltimore		28	41%
9	Calvert		0	0%
10	Caroline		0	0%
11	Carroll		3	4%
12	Cecil		0	0%
13	Charles		0	0%
14	Dorchester		0	0%
15	Frederick		0	0%
16	Garrett		0	0%
17	Harford		4	6%
18	Howard		4	6%
19	Kent		0	0%
20	Montgomery		0	0%
21	Prince George's		0	0%
22	Queen Anne's		1	1%
23	Saint Mary's		0	0%
24	Somerset		0	0%
25	Talbot		0	0%
26	Washington		0	0%
27	Wicomico		0	0%
28	Worcester		0	0%
	Total		68	100%

7. In which Florida county do you primarily reside?			
#	Answer	Response	%
5	Alachua	0	0%
6	Baker	0	0%
7	Bay	0	0%
8	Bradford	0	0%
9	Brevard	0	0%
10	Broward	0	0%
11	Calhoun	0	0%
12	Charlotte	0	0%
13	Citrus	0	0%
14	Clay	0	0%
15	Collier	0	0%
16	Columbia	0	0%
17	DeSoto	0	0%
18	Dixie	0	0%
19	Duval	0	0%
20	Escambia	0	0%
21	Flagler	4	6%
22	Franklin	0	0%
23	Gadsden	0	0%
24	Gilchrist	0	0%
25	Glades	0	0%
26	Gulf	0	0%
27	Hamilton	0	0%
28	Hardee	0	0%
29	Hendry	0	0%
30	Hernando	0	0%
31	Highlands	0	0%
32	Hillsborough	0	0%
33	Holmes	0	0%
34	Indian River	0	0%
35	Jackson	0	0%
36	Jefferson	0	0%
37	Lafayette	0	0%
38	Lake	5	7%
39	Lee	0	0%

40	Leon	0	0%
41	Levy	0	0%
42	Liberty	0	0%
43	Madison	0	0%
44	Manatee	0	0%
45	Marion	0	0%
46	Martin	0	0%
47	Miami-Dade	0	0%
48	Monroe	0	0%
49	Nassau	0	0%
50	Okaloosa	0	0%
51	Okeechobee	0	0%
52	Orange	25	37%
53	Osceola	8	12%
54	Palm Beach	0	0%
55	Pasco	0	0%
56	Pinellas	0	0%
57	Polk	0	0%
58	Putnam	0	0%
59	Santa Rosa	0	0%
60	Sarasota	0	0%
61	Seminole	12	18%
62	St. Johns	0	0%
63	St. Lucie	0	0%
64	Sumter	2	3%
65	Suwannee	0	0%
66	Taylor	0	0%
67	Union	0	0%
68	Volusia	12	18%
69	Wakulla	0	0%
70	Walton	0	0%
71	Washington	0	0%
	Total	68	100%

8. In which Connecticut county do you primarily reside?				
#	Answer		Response	%
5	Fairfield		0	0%
6	Hartford		57	84%
7	Litchfield		0	0%
8	Middlesex		6	9%
9	New Haven		0	0%
10	New London		0	0%
11	Tolland		5	7%
12	Windham		0	0%
	Total		68	100%

In which L	Jtah county do yo	ou primarily reside?		
#	Answer		Response	%
13	Beaver		0	0%
14	Box Elder		1	1%
15	Cache		0	0%
16	Carbon		0	0%
17	Daggett		0	0%
18	Davis		6	9%
19	Duchesne		0	0%
20	Emery		0	0%
21	Garfield		0	0%
22	Grand		0	0%
23	Iron		0	0%
24	Juab		0	0%
25	Kane		0	0%
26	Millard		0	0%
27	Morgan		1	1%
28	Piute		0	0%
29	Rich		0	0%
30	Salt Lake		32	47%
31	San Juan		0	0%
32	Sanpete		0	0%
33	Sevier		0	0%
34	Summit		1	1%
35	Tooele		2	3%
36	Uintah		0	0%
37	Utah		15	22%
38	Wasatch		2	3%
39	Washington		0	0%
40	Wayne		0	0%
41	Weber		8	12%
	Total		68	100%

10. In which	10. In which Wisconsin county do you primarily reside?			
#	Answer	Response	%	
13	Adams	0	0%	
14	Ashland	0	0%	
15	Barron	0	0%	
16	Bayfield	0	0%	
17	Brown	0	0%	
18	Buffalo	0	0%	
19	Burnett	0	0%	
20	Calumet	0	0%	
21	Chippewa	0	0%	
22	Clark	0	0%	
23	Columbia	0	0%	
24	Crawford	0	0%	
25	Dane	52	81%	
26	Dodge	0	0%	
27	Door	0	0%	
28	Douglas	0	0%	
29	Dunn	0	0%	
30	Eau Claire	0	0%	
31	Florence	0	0%	
32	Fond du Lac	0	0%	
33	Forest	0	0%	
34	Grant	0	0%	
35	Green	0	0%	
36	Green Lake	0	0%	
37	Iowa	0	0%	
38	Iron	0	0%	
39	Jackson	0	0%	
40	Jefferson	0	0%	
41	Juneau	0	0%	
42	Kenosha	0	0%	
43	Kewaunee	0	0%	
44	La Crosse	0	0%	
45	Lafayette	0	0%	
46	Langlade	0	0%	
47	Lincoln	0	0%	

48	Manitowoc	0	0%
49	Marathon	0	0%
50	Marinette	0	0%
51	Marquette	0	0%
52	Menominee	0	0%
53	Milwaukee	0	0%
54	Monroe	0	0%
55	Oconto	0	0%
56	Oneida	0	0%
57	Outagamie	0	0%
58	Ozaukee	0	0%
59	Pepin	0	0%
60	Pierce	0	0%
61	Polk	0	0%
62	Portage	0	0%
63	Price	0	0%
64	Racine	0	0%
65	Richland	0	0%
66	Rock	7	11%
67	Rusk	0	0%
68	Sauk	5	8%
69	Sawyer	0	0%
70	Shawano	0	0%
71	Sheboygan	0	0%
72	St. Croix	0	0%
73	Taylor	0	0%
74	Trempealeau	0	0%
75	Vernon	0	0%
76	Vilas	0	0%
77	Walworth	0	0%
78	Washburn	0	0%
79	Washington	0	0%
80	Waukesha	0	0%
81	Waupaca	0	0%
82	Waushara	0	0%
83	Winnebago	0	0%

84	Wood	0	0%
	Total	64	100%

## 11. In which of the following types of activities, if any, have you participated in the past six months? Please select all that apply.

#	Answer	Response	%
1	Social painting event	245	61%
2	Book club meeting	138	34%
3	PTA meeting	107	26%
5	Product demonstration event	141	35%
6	Yoga class	213	53%
7	None of the above	52	13%
8	Class reunion / alumni event	109	27%
10	Job fair / networking event	148	37%

# 12. In which of the following types of activities, if any, do you expect to participate in the next six months? Please select all that apply.

#	Answer	Response	%
1	Social painting event	159	100%
2	Book club meeting	54	34%
3	PTA meeting	42	26%
5	Product demonstration event	52	33%
6	Yoga class	89	56%
7	None of the above	0	0%
8	Class reunion / alumni event	35	22%
10	Job fair / networking event	53	33%

13. With regard to social painting, do you associate the phrase you just considered with one company, more than one company, no company at all, or you don't know?

#	Answer	Response	%
1	One company	70	35%
2	More than one company	52	26%
3	No company at all	64	32%
4	Don't know / No opinion	16	8%
	Total	202	100%

- 14. In the last question, you stated that with regard to social painting, you associate the phrase PAINT NITE with one company. Why do you say that? Please list everything that comes to mind.
- 15. In the last question, you stated that with regard to social painting, the phrase PAINT NITE is associated with more than one company. Why do you say that? Please list everything that comes to mind.
- 16. In the last question, you stated that with regard to social painting, the phrase PAINT NITE is associated with no company at all. Why do you say that? Please list everything that comes to mind.
- 17. In the spaces provided below, please list all of the social painting event brands that you are aware of. Please list everything that comes to mind. If you cannot recall any social painting event brands, please click the "Next" button below to advance to the next question.

18. Which of the following social painting event brands, if any, are you aware of?					
#	Answer			Response	%
1	PAINT NITE			101	50%
2	PAINTING WITH A TWIST			35	17%
3	PINOT'S PALETTE			18	9%
4	WINE & CANVAS			46	23%
5	PUB AND PAINT			31	15%
6	BOTTLE & BOTTEGA			8	4%
7	VINO VAN GOGH			14	7%
8	THE PAINT MIXER			25	12%
9	YES YOU CANVAS!			21	10%
10	DRINKABLE ARTS			12	6%
11	PAINT SOCIAL ART			27	13%
12	COLORS AND BOTTLES			20	10%
13	PAINT BAR			45	22%
14	None of the above			29	14%

19. How is Paint Nite different from other social painting events that you know about? Please select all that apply.					
#	Answer		Response	%	
1	Don't know / no opinion		27	27%	
2	It's more fun		52	51%	
3	It takes place in a restaurant instead of a studio		31	31%	
4	It has real artists as		22	22%	

44

46

44%

46%

teachers

class

It's less formal It's more social

event than art

5

6

20. How did you first become aware of social painting events?				
#	Answer		Response	%
1	Facebook		141	35%
2	Word of mouth		159	39%
3	Online advertisement		44	11%
4	Print advertisement		8	2%
5	TV / radio advertisement		11	3%
6	Other (please specify):		27	7%
7	Don't know / don't recall		14	3%
	Total		404	100%

Other (please specify):  friend groupon Groupon Google
groupon Groupon
Groupon
Groupon Google
Google
received gift certificate
Friend
friend
a friend invited me
Groupon
meetup.com
FRIEND
friends oatkaraoke nite
friends
online article
walked by one
Groupon
Groupon
meetup.com
groupon
Corporate outing
groupon
groupon
groupon
friend insisted I join
offers on Groupon
sister
Groupon

## 21. When you attended a social painting event, with whom did you attend? (Or, if you plan to attend a social painting event, with whom will you attend?)

#	Answer	Response	%
1	Girls' night out	134	33%
2	Date night	38	9%
3	Co-workers	27	7%
4	Group of friends	136	34%
5	Family	53	13%
6	Other (please specify):	12	3%
7	Don't know / don't recall	4	1%
	Total	404	100%

Other (please specify):	
havent yet	
pta	
alone	
my best friend	
daughter	
alone	
neighbors	
myself	
myself	
best friend	
school event	
Bachelorette party	

## 22. Now, a few more questions for classification purposes only. First, which of the following best describes your educational background?

#	Answer	Response	%
1	Less than high school	4	1%
2	High school/Technical school	60	15%
3	College/Some college	264	65%
4	Graduate School	76	19%
	Total	404	100%

23. Which of the following includes your household's approximate annual income in 2014?				
#	Answer		Response	%
1	Under \$35,000		77	19%
2	\$35,000 - \$49,999		87	22%
3	\$50,000 - \$74,999		82	20%
4	\$75,000 - \$99,999		76	19%
5	\$100,000 - \$124,999		40	10%
6	\$125,000 and above		34	8%
7	I prefer not to answer		8	2%
	Total		404	100%

## **Exhibit 4—Disposition of Contacts**



## Paint Nite Study

Disposition of Contacts		
Responded to invitation	<b>n</b> 4,887	Incidence %
Rejected - failed instruction acknowledgement question	129	2.6%
Rejected - failed gender question (male)	434	8.9%
Rejected - failed age question (under 21)	22	0.5%
Rejected - failed residency requirement (state)	793	16.2%
Rejected - failed residency requirement (county)	2,489	50.9%
Rejected - did not participate/anticipate participating in social painting		
market	616	12.6%
Total qualified respondents	404	8.3%

### **AFFIDAVIT OF Brianna Brown**

- I, Brianna Brown, being sworn, do hereby state and depose as follows:
- 1. The statements made herein are based upon my personal knowledge.
- 2. I am Hospitality Manager of Bertucci's Medford
- 3. Beginning in approximately September 2014, we began hosting "Paint Nite" events at Bertucci's on a weekly basis. The "Paint Nite" events have been well attended, with approximately 36 patrons attending each event.
- 4. The typical "Paint Nite" event combines two entertaining and enjoyable pastimes, artistic painting and drinking cocktails. The patrons in attendance follow the step-by-step instructions of a master local artist while enjoying drinks from the bar.
- 5. I have been a Hospitality Manager at Bertucci's for over 4 years and have otherwise been familiar with entertainment events at restaurants and bars for decades. The first time I ever heard or saw any entertainment service referred to as "Paint Nite" was around October 2014, I had never seen or heard anyone refer to any entertainment services as "Paint Nite" before that time.
- 6. Since that time, I have personally witnessed Paint Nite LLC consistently utilize the "Paint Nite" brand in its advertisements, signage, and elsewhere to refer to its own entertainment services.
- 7. As a result of years of such efforts by Paint Nite LLC, I personally associate "Paint Nite" exclusively with Paint Nite LLC. As a manager of Bertucci's that utilizes entertainment services to drive traffic to my restaurant, "Paint Nite" is very closely and specifically linked to Paint Nite LLC in my mind.

I declare under the penalty of perjury that the foregoing is true and correct.

Executed this 14th day of May, 2015 in the city of Medford in the state of Massachusetts.

Insert Name

2

#### AFFIDAVIT OF I.V. Miller

- I, I.V. Miller, being sworn, do hereby state and depose as follows:
- 1. The statements made herein are based upon my personal knowledge.
- 2. I am General Manager of Bar Louie, Hampton, VA.
- 3. Beginning in approximately April 2014, we began hosting "Paint Nite" events at Bar Louie on a weekly basis. The "Paint Nite" events have been well attended, with approximately 36 patrons attending each event.
- 4. The typical "Paint Nite" event combines two entertaining and enjoyable pastimes, artistic painting and drinking cocktails. The patrons in attendance follow the step-by-step instructions of a master local artist while enjoying drinks from the bar. Although the "Paint Nite" events usually combine painting and drinking at night, they have not been exclusive to painting at night. For example, the "Paint Nite" events have included events where patrons paint pictures during the daytime.
- 5. I have been a General Manager at Bar Louie for over two and a half years and have otherwise been familiar with entertainment events at restaurants and bars for decades. The first time I ever heard or saw any entertainment service referred to as "Paint Nite" was around the time we began working with Paint Nite LLC. I had never seen or heard anyone refer to any entertainment services as "Paint Nite" before that time.
- 6. Since that time, I have personally witnessed Paint Nite LLC consistently utilize the "Paint Nite" brand in its advertisements, signage, and elsewhere to refer to its own entertainment services.
- 7. As a result of years of such efforts by Paint Nite LLC, I personally associate "Paint Nite" exclusively with Paint Nite LLC. As a General Manager of a restaurant that utilizes

entertainment services to drive traffic to my [restaurant/bar], "Paint Nite" is very closely and specifically linked to Paint Nite LLC in my mind.

8. I have had several other vendors contact me offering the same services, however those venues do not use the company name or trademark PAINT NITE for their social painting events, those vendors use names and trademarks that are distinguishable from "paint nite".

I declare under the penalty of perjury that the foregoing is true and correct.

Executed this 20th day of May, 2015 in the city of Hampton in the state of Virginia

#### **AFFIDAVIT OF Savannah Yauss**

- I, Savannah Yauss, being sworn, do hereby state and depose as follows:
- 1. The statements made herein are based upon my personal knowledge.
- 2. I am Sales & Events Coordinator of Joe's Crab Shack.
- 3. Beginning in approximately May 2014, we began hosting "Paint Nite" events at Joe's Crab Shack on a bi-weekly basis. The "Paint Nite" events have been well attended, with approximately 40 patrons attending each event.
- 4. The typical "Paint Nite" event combines two entertaining and enjoyable pastimes, artistic painting and drinking cocktails. The patrons in attendance follow the step-by-step instructions of a master local artist while enjoying drinks from the bar. Although the "Paint Nite" events usually combine painting and drinking at night, they have not been exclusive to painting at night. For example, the "Paint Nite" events have included events where patrons paint pictures during the daytime.
- 5. I have been a Sales & Events Coordinator at Joe's Crab Shack for over 7 years and have otherwise been familiar with entertainment events at restaurants and bars for decades. The first time I ever heard or saw any entertainment service referred to as "Paint Nite" was around May 2014. I had never seen or heard anyone refer to any entertainment services as "Paint Nite" before that time.
- 6. Since that time, I have personally witnessed Paint Nite LLC consistently utilize the "Paint Nite" brand in its advertisements, signage, and elsewhere to refer to its own entertainment services.

7. As a result of years of such efforts by Paint Nite LLC, I personally associate "Paint Nite" exclusively with Paint Nite LLC. As a Sales & Events Coordinator of a restaurant that utilizes entertainment services to drive traffic to my restaurant, "Paint Nite" is very closely and specifically linked to Paint Nite LLC in my mind.

I declare under the penalty of perjury that the foregoing is true and correct.

Executed this 19 day of May, 2015 in the city of Suffolk in the state of Virginia.

Savannah Yauss

Savannah Yawst

### **AFFIDAVIT OF Vicki Owings**

- I, Vicki Owings, being sworn, do hereby state and depose as follows:
- 1. The statements made herein are based upon my personal knowledge.
- 2. I am Event Coord. of Morgan Street Brewery.
- 3. Beginning in approximately February of 2014, we began hosting "Paint Nite" events at Morgan Street Brewery on a bi-weekly basis. The "Paint Nite" events have been well attended, with approximately 45 patrons attending each event.
- 4. The typical "Paint Nite" event combines two entertaining and enjoyable pastimes, artistic painting and drinking cocktails. The patrons in attendance follow the step-by-step instructions of a master local artist while enjoying drinks from the bar. Although the "Paint Nite" events usually combine painting and drinking at night, they have not been exclusive to painting at night. For example, the "Paint Nite" events have included events where patrons paint pictures during the daytime.
- 5. I have been the Event Coord. at Morgan Street Brewery for 20 years and have otherwise been familiar with entertainment events at restaurants and bars for decades. The first time I ever heard or saw any entertainment service referred to as "Paint Nite" was around February of 2014. I had never seen or heard anyone refer to any entertainment services as "Paint Nite" before that time.
- 6. Since that time, I have personally witnessed Paint Nite LLC consistently utilize the "Paint Nite" brand in its advertisements, signage, and elsewhere to refer to its own entertainment services.
- 7. As a result of years of such efforts by Paint Nite LLC, I personally associate "Paint Nite" exclusively with Paint Nite LLC. As an event coord. of a restaurant/bar that utilizes

entertainment services to drive traffic to my restaurant/bar, "Paint Nite" is very closely and specifically linked to Paint Nite LLC in my mind.

I declare under the penalty of perjury that the foregoing is true and correct.

Executed this 19th day of May, 2015 in the city of St. Louis in the state of Missouri.

Víckí Owings

Vicki Owings

Event Coord.

Morgan Street Brewery

314.231.9970

### AFFIDAVIT OF Barbara de Oliveira

- I, Barbara de Oliveira, being sworn, do hereby state and depose as follows:
- 1. The statements made herein are based upon my personal knowledge.
- 2. I am Director of Sales of The Regatta Banquet and Conference Center.
- 3. Beginning in approximately June 2014, we began hosting "Paint Nite" events at Regatta on a bi-weekly basis. The "Paint Nite" events have been well attended, with approximately 50 patrons attending each event.
- 4. The typical "Paint Nite" event combines two entertaining and enjoyable pastimes, artistic painting and drinking cocktails. The patrons in attendance follow the step-by-step instructions of a master local artist while enjoying drinks from the bar. Although the "Paint Nite" events usually combine painting and drinking at night, they have not been exclusive to painting at night. For example, the "Paint Nite" events have included events where patrons paint pictures during the daytime.
- 5. I have been the Director at the Regatta for over 2.5 years and have otherwise been familiar with entertainment events at restaurants and bars for decades. The first time I ever heard or saw any entertainment service referred to as "Paint Nite" was around Summer of 2014. I had never seen or heard anyone refer to any entertainment services as "Paint Nite" before that time.
- 6. Since that time, I have personally witnessed Paint Nite LLC consistently utilize the "Paint Nite" brand in its advertisements, signage, and elsewhere to refer to its own entertainment services.

7. As a result of years of such efforts by Paint Nite LLC, I personally associate "Paint Nite" exclusively with Paint Nite LLC. As the director of a function hall that utilizes entertainment services to drive traffic to my venue, "Paint Nite" is very closely and specifically linked to Paint Nite LLC in my mind.

Executed this 21st day of May, 2015 in the city of Eliot, in the state of Maine.

- Dabarade Oliveita [INSERT NAME]